89-1324

No.____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

GANNETT CO., INC.,

Petitioner

v.

STATE OF DELAWARE and
STEVEN B. PENNELL,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

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February 9, 1990

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82/10

QUESTIONS PRESENTED

1. Whether the suppression by a trial court of the names of jurors in a criminal trial, absent a showing of necessity, *to wit:* (i) a substantial probability of a threat to a compelling State interest, (ii) the absence of less restrictive alternatives, and (iii) a narrowly drawn order which effectively prevents against the threatened harm, conflicts with the decisions of this Honorable Court establishing a right of access under the First Amendment to criminal proceedings.

2. Whether the public has a right under the First Amendment to hear the names of jurors in a criminal case announced in open court during the *voir dire* proceeding such that public announcement cannot be suppressed absent a showing on the record of necessity.

LIST OF PARTIES

The parties to the proceeding below were Petitioner Gannett Co., Inc., and Respondents the State of Delaware and Steven B. Pennell. The Reporter's Committee for Freedom of the Press, the American Society of Newspaper Editors, the Maryland-Delaware-District of Columbia Press Association, the National Newspaper Association and the Society of Professional Journalists were granted permission by the Supreme Court of the State of Delaware to file a joint *amicus curiae* brief in support of Petitioner.

The Supreme Court of the State of Delaware appointed Steven J. Rothschild, Esquire of the law firm of Skadden, Arps, Slate, Meagher & Flom, to act as *amicus curiae,* assisting the Respondents in their appeal as they were simultaneously involved in the underlying criminal trial. As that trial is now over, and Mr. Rothschild's role completed, Mr. Rothschild has no further interest in this action.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

Petitioner Gannett Co., Inc. respectfully prays that a writ of certiorari issue to review the judgment and order of the Supreme Court of the State of Delaware entered in this proceeding on November 13, 1989.

OPINIONS BELOW

The bench ruling of the Superior Court for the State of Delaware in and for New Castle County (the "trial court"), dated September 11, 1989, as well as the order (without opinion) of the Delaware Supreme Court, dated November 13, 1989, affirming the bench ruling of the trial court, are not reported. The opinion

of the Delaware Supreme Court in support of its order has not been issued as of the time of docketing this Petition for a Writ of Certiorari.

Two additional opinions are included for the convenience of the Court. The decision of the Delaware Supreme Court accepting the appeal is reported at 565 A.2d 895. The decision of the trial court of October 2, 1989, denying post-*voir dire* access to the names of the jurors is not reported.

All of these opinions and orders are reprinted in the appendix hereto.

JURISDICTION

The judgment and order of the Supreme Court of the State of Delaware, affirming the decision of the trial court denying petitioner's motion to vacate the order suppressing the names of the jurors, was entered on November 13, 1989. (App. at A-63). This petition is being docketed in this Court within 90 days from the order of the Delaware Supreme Court. The jurisdiction of this Honorable Court is invoked under 28 *U.S.C.* §1257(a).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

First Amendment, United States Constitution:

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . .

10 *Del. C.* §4513(a):

> The names of persons summoned for jury service shall be disclosed to the public and the contents of jury qualification forms completed by them shall be made available to the parties unless the Court determines that any or all of this information should be kept confidential or its use limited in whole or in part in any case or cases.

A copy of the statute is included in the appendix at A-1.

* * *

STATEMENT OF THE CASE

On November 30, 1988, Respondent Steven B. Pennell was charged with three counts of first degree murder. On July 28, 1989, the trial court *sua sponte* entered an order (the "Order") directed to the Prothonotary of the Superior Court of the State of Delaware, which stated, in pertinent part:

> In order to protect the integrity of the jury in this case, I am taking the following steps:
>
> . . .
>
> 3. All jury selection in open Court will be accomplished by numbers and not by names.
>
> IT IS SO ORDERED.

A copy of the Order is included in the appendix at A-2.

The trial court gave no notice before issuing the Order suppressing the traditionally public announcement of the names of the jurors selected to sit on the panel. The Order was not docketed until after an appeal had been filed to the Delaware Supreme Court. Prior to issuing the Order, the trial court held no hearing and made no findings of fact to support the Order. Since the identities of the jurors were disclosed to the Respondents, the Order was designed solely to prevent the public at large from learning the jurors' names.

On September 7, 1989, upon discovering the Order, Petitioner filed a motion to intervene and a motion to vacate the Order. Specifically, Petitioner objected to the procedure of withholding the traditionally public announcement of the jurors' names during the *voir dire* proceeding.

Petitioner argued that the trial court failed to satisfy the constitutional requirements set forth in *Press-Enterprise Co. v. Superior Court of California,* 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) *("Press Enterprise I")*, and *Press-Enterprise Co. v. Superior Court of California,* 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) *("Press-Enterprises II")*, in that the record contained no facts demonstrating that (1) a substantial probability of a threat to a compelling State interest existed; (2) less restrictive alternatives were considered and were properly

found to be impracticable; and (3) the Order was narrowly tailored to effectively protect against any threat to any compelling State interest while not infringing unduly upon legitimate First Amendment interests. *See Press-Enterprise I,* 464 U.S. at 510, 104 S.Ct. at 510, 78 L.Ed.2d at 638; *Press-Enterprise II,* 478 U.S. at 14, 106 S.Ct. at 2743, 92 L.Ed.2d at 13-14. Indeed, the record contained no findings whatsoever.

Petitioner also argued that 10 *Del. C.* §4513(a), on which the trial court apparently relied, granted the court unbridled discretion to determine whether the names of the jurors should be suppressed, and as such was repugnant to the First Amendment to the United States Constitution, as it denied access to information traditionally available to the public at the *voir dire* proceeding. Petitioner argued that, to that extent, the statute violated the First Amendment as it was contrary to the holding of this Honorable Court in *Press-Enterprise Co. v. Superior Court of California,* 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984).

On September 11, 1989, the trial court issued a bench ruling denying Petitioner's motion to vacate the Order. *State of Delaware v. Steven B. Pennell,* Cr. A. Nos. IN88-12-0051-0053 (Del. Super., Sept. 11, 1989) (transcript). A copy of the transcript is included in the appendix at A-3-8. In that bench ruling the trial court stated that it was motivated by the fact that Petitioner had previously published in the press a profile of jurors in an unrelated murder case. (App. at A-4-5). The trial court ignored the issue of the constitutionality of the application of the statute under these circumstances.

The trial court made no findings demonstrating a substantial probability of a threat to any compelling State interest. The trial court stated that its purpose in entering the Order was "to protect the jury from potential interference, intimidation and loss of privacy"[1] (App. at A-5) and to protect the criminal

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1. The trial court erroneously stated that Petitioner sought access to the home addresses of the jurors. (App. at A-6). All Petitioner sought was the right to have the names of the jurors announced in open court during the *voir dire,* as is traditionally done.

defendant's right to a fair trial. (App. at A-7). The trial court concluded that there was a threat of "contamination" resulting from the jurors receiving unsolicited opinions about the trial from friends and relatives. (App. at A-7). Yet the trial court failed to explain or to place on the record any evidence supporting its conclusion that public access to the names of the jurors would adversely affect the criminal defendant's right to a fair trial. Neither did the trial court make any findings as to the realistic probability of jury interference in this case. *Compare United States v. Brooklier,* 685 F.2d 162, 172-173 (9th Cir. 1982) (failing to find a "substantial probability" of a threat to a fair trial resulting from jurors' exposure to views of family and friends). Nor did the trial court explain what legally cognizable privacy right of the jurors was threatened, or the factual basis for that conclusion.

Further, the trial court made no findings as to the availability or practicability of less restrictive alternatives. Nor did the trial court make any findings to support the conclusion that the Order was narrowly tailored to protect against an imagined threat to a compelling State interest without infringing unduly upon legitimate First Amendment rights. Thus, the trial court failed to make any of the findings required by *Press-Enterprise I* and *Press-Enterprise II*.

The trial court conceded that it was acting upon pure "speculation." (App. at A-6). Nonetheless, the trial court stated that it was necessary to suppress the otherwise public announcement of the jurors' names during the *voir dire* so as to allow the trial court to utilize the *voir dire* to build a record to determine whether there would be public access to the names of the jurors post-*voir dire*. (App. at A-6).

That same day, after the trial court announced its bench ruling, the jury selection process began. As part of the *voir dire*, the trial court asked the jurors whether public announcement of their names would adversely affect their ability to render a fair and impartial verdict. All those selected as jurors answered in the negative. The trial began on September 25, 1989.

On September 18, 1989, Petitioner filed a notice of appeal with the Delaware Supreme Court, No. 372, 1989, appealing

from the bench ruling of September 11, 1989. On September 19, the Delaware Supreme Court issued an order to show cause why the appeal should not be dismissed on the grounds that (1) the Delaware Supreme Court had no jurisdiction to hear interlocutory appeals in criminal proceedings, and (2) Petitioner lacked standing to intervene in a criminal proceeding or to appeal from an order entered in such a proceeding. A copy of the order to show cause is including in the appendix at A-9-10. On September 28, 1989, after briefing by the parties, the Delaware Supreme Court dissolved the order to show cause, finding that (1) Petitioner had standing to intervene, and (2) the bench ruling was an appealable final order in a separate civil action. *Gannett Co., Inc. v. State of Delaware v. Steven B. Pennell,* 565 A.2d 895 (Del. 1989). A copy of that opinion is included in the appendix at A-11-21.

On October 2, 1989, the day before Petitioner's opening brief on appeal was to be filed, the trial court issued a written opinion holding that post-*voir-dire* access to the names of the jurors would not be allowed. *State of Delaware v. Steven B. Pennell,* Cr. A. Nos. IN88-12-0051-0053 (Del. Super., Oct. 2, 1989). A copy of that opinion is included in the appendix at A-22-57.

The trial court held in that latter opinion that 10 *Del. C.* §4513(a) granted it discretionary authority to withhold the names of the jurors. (App. at A-25). The trial court stated, again without any basis in the record, that there was a "reasonable probability" of a threat to the defendant's right to a fair trial. (App. at A-32). The trial court relied on the fact that one juror said "I would not like my name in the paper." (App. at A-35). The trial court failed to acknowledge that this juror was excused for unrelated reasons prior to the beginning of the trial. The trial court erroneously cited *Press-Enterprise I* as authority supporting the Order. (App. at A-41).

On October 3, 1989, the Delaware Supreme Court granted a motion by the Reporter's Committee for Freedom of the Press, The American Society of Newspaper Editors, The Maryland-Delaware-District of Columbia Press Association, the National

Newspaper Association and the Society of Professional Journalists to file a joint *amicus curiae* brief. A copy of that order is included in the appendix at A-58-60.

On October 20, 1989, after oral argument before a three member panel, the Delaware Supreme Court issued an order scheduling a rehearing *en banc*. The order also directed the parties to exchange supplemental memoranda addressing the question of whether the actions of the trial court raised issues of the public's right of access to judicial records, and, if so, what standards were to be applied to the denial of such access. A copy of this order is included in the appendix at A-61-62. This request was apparently prompted by a position taken by one of the Justices of the Delaware Supreme Court at oral argument that, as the names of the jurors announced in open court were derived from a list compiled for the proceeding, the issue was one of access to judicial records, not access to judicial proceedings.

Petitioner, in its supplemental brief, argued (1) absent closure, jurors' names are derived in open court from sources independent of any court-generated list; (2) to the extent that a court-generated list is a source for obtaining such names, the use of that list in connection with the *voir dire* proceeding renders the information on that list part of the proceeding such that the issue is access to an element of a judicial proceeding; and (3) the constitutional standard for access to judicial records is identical to that for access to judicial proceedings.

On November 13, 1989, the Delaware Supreme Court issued an order affirming the bench ruling of the trial court by a three-to-two vote. A copy of that order is included in the appendix at A-63. The written opinion in support of that order is presently pending.

REASON FOR GRANTING THE WRIT

1. The Decisions Of The Delaware Courts Conflict With The Decision Of This Honorable Court Finding A First Amendment Right Of Access To Voir Dire Proceedings.

The question of the right of the public under the First Amendment of the United States Constitution to know who is

acting as the trier of fact in a public criminal proceeding, who is deciding guilt or innocence, and who is deciding the life or death of a criminal defendant, is a substantial one. The question of the right of the government to withhold such information, and in what circumstances, is equally substantial.

The goals of the First Amendment are to protect and promote the free discussion of governmental affairs, and to ensure that individual citizens can effectively participate in and contribute to our republican system of self government. This Honorable Court has recognized that public access to criminal trials is essential to promoting these goals. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980). This right of access has been extended to preliminary hearings. *Press-Enterprise Co. v. Superior Court of California*, 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986). Most importantly to this case, the right of access has been extended to *voir dire* proceedings. *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984).

The decision of the Delaware Supreme Court grants the judiciary unbridled discretion to deny public access to the names of the jurors. Under the Delaware rule, a court can suppress the names of the jurors, regardless of the nature of the trial or the surrounding circumstances (or lack thereof). A court can suppress the identity of participants in a public proceeding based on concerns which are not only hypothetical, but are so remote and speculative that they fail to establish a compelling need. A court can empanel an anonymous jury, whether the trial involves organized crime figures or jaywalkers, with no justification other than the trial judge's speculation.

By allowing such judicial power to be exercised in a purely discretionary manner, the public can be (and was, in this case) denied its important role in the process. Before such an order can be entered denying public access to the names of jurors, there must be notice and a hearing from which a court can make findings demonstrating a substantial probability of a threat to a compelling State interest. Here, no such hearing was held and

no such showing was made. Further, under the Delaware rule the public can be denied its First Amendment right in the absence of any showing that less restrictive alternatives are either unavailable or impracticable. Here, no such showing was made. Finally, a court can deny the public its ability to participate in insuring the impartiality of a jury without any showing that withholding the names of jurors is a narrowly tailored response which effectively protects against any alleged threat to a compelling State interest. Again, no such showing was made.

The action of the Delaware trial court reduces the constitutional right of access to a mere right to see the proceeding without any corresponding right to hear the relevant information in that proceeding. *Compare In re Memphis Publishing Co.*, 887 F.2d 646 (6th Cir. 1989) (use of a device to prevent the public from hearing answers to selected *voir dire* questions constitutes an unconstitutional denial of access under *Press-Enterprise I*). Such a result wholly eviscerates the core purpose of the First Amendment.

The actions of the trial court in direct opposition to the precedents laid down by this Honorable Court justify the grant of certiorari to review the judgment below.

2. Whether There Is A Public Right Of Access Under The First Amendment To The Identity Of Jurors In A Criminal Case Is An Important Issue Of First Impression Which Should Be Settled By This Court.

In the alternative, assuming *arguendo* that this case is not controlled by *Press-Enterprise I*, the issue of whether the suppression of the identity of key participants in a criminal proceeding of great public concern, at the sole discretion of the trial court judge, is consistent with the goals and requirements of the First Amendment is an important issue of federal law which should be decided by this Court.

It is well-recognized that any attempt to enjoin the media from publishing the names of jurors announced in open court must meet the high constitutional standard for the issuance of a

prior restraint. *E.g., Capital Cities Media, Inc. v. Toole,* 463 U.S. 1309, 103 S.Ct. 3524, 77 L.Ed.2d 1284 (1983); *State ex rel. New Mexico Press Association v. Kaufman,* 648 P.2d 300 (N.M. 1982). *Accord Oklahoma Publishing Co. v. District Court In and For Oklahoma County,* 480 U.S. 308, 97 S.Ct. 1045, 51 L.Ed.2d 355 (1977). The issue of whether a trial court may prevent the traditional announcement in open court of the names of jurors, and in what circumstances, is a novel issue that has yet to be clearly defined under the First Amendment. The Delaware Supreme Court, in affirming the order of the trial court, effectively ruled that there is no such right of access under the First Amendment.

In *Press-Enterprise II,* this Honorable Court indicated that a right of access to information derived from a judicial proceeding is accorded First Amendment protection if (a) the place and process have historically been open to the public, and (b) public access plays a significant positive rule in the functioning of the particular process in question. 478 U.S. at 8, 106 S.Ct. at 2740, 92 L.Ed.2d at 10.

Public announcement of jurors' names has been the historical practice, dating back to 17th-century England. *See* 3 W. Blackstone, *Commentaries On the Law Of England* 358-359 (1769). Awareness of the jurors' names allows the public to participate in ensuring the fairness of criminal trials, as it allows citizens who have personal knowledge about the jurors to inform a court of any biases that may have escaped detection during the *voir dire. E.g., Commercial Printing Co. v. Lee,* 552 S.W.2d 270, 273 (Ark. 1977). Independent verification of the impartiality of the jury based on the community's personal knowledge about the jurors enhances both the fairness of the criminal trial and the appearance of fairness.

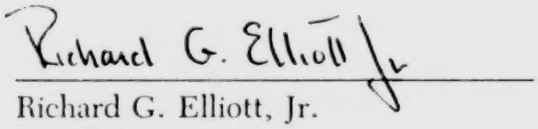
Jurors are the deciders of fact and have as much power as a judge, if not more, in a criminal trial. No one would argue that judges should be shrouded in cloaks of anonymity. Similarly, jurors, who decide guilt or innocence, and who can determine whether a criminal defendant lives or dies, should not be kept a secret society absent the most compelling circumstances.

The news media, in its efforts to inform the citizenry of events of public concern, have been reporting on the jury selection process in trials across the country, including the identity of those chosen to sit as jurors. Until this Honorable Court decides whether such a First Amendment right of access exists, the right of the public to know who is acting as their representatives at trial, and the right of the public to use that information to verify independently the impartiality of the jury, is placed at jeopardy. Further, the right of the press to report on events occurring in open court will be endangered.

CONCLUSION

For these reasons, this Honorable Court should issue a writ of certiorari to review the judgment and order of the Delaware Supreme Court.

Respectfully submitted,



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DATE: February 9, 1990

APPENDIX

EXHIBIT A

§4513. Disclosure and preservation of records.

(a) The names of persons summoned for jury service shall be disclosed to the public and the contents of jury qualification forms completed by them shall be made available to the parties unless the Court determines that any or all of this information should be kept confidential or its use limited in whole or in part in any case or cases.

(b) Records used in the selection process shall not be disclosed, except in accordance with the jury selection plan or as necessary in the preparation or presentation of a motion challenging compliance with this chapter.

(c) Records used in the selection process shall be preserved for at least 4 years. (60 Del. Laws, c. 225, §2; 66 Del. Laws, c. 5, §1.)

EXHIBIT B

SUPERIOR COURT OF DELAWARE

MEMORANDUM

FROM: JUDGE GEBELEIN

TO: THE HONORABLE DEBORAH H. CAPANO
PROTHONOTARY

FELICIA C. JONES
ACTING JURY MANAGER

DATE: JULY 28, 1989

RE: STATE V. STEVEN B. PENNELL
JURY SELECTION

In order to protect the integrity of the jury in this case, I am taking the following steps:

1. I direct the Prothonotary to keep confidential the names of all jurors subpoenaed for this jury panel. The jury information sheet will be available only to the attorneys for the parties. The names will not be released to anyone else.

2. On jury selection days those jurors who respond will be assigned a number from 1 to 100. Those numbers will be placed on the juror information sheets delivered to the attorneys and the Court.

3. All jury selection in open Court will be accomplished by numbers and not by names.

IT IS SO ORDERED.

The Honorable Richard S. Gebelein

EXHIBIT C

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	:	
v.	:	IN88-12-0051 thru 0053
STEVEN B. PENNELL,	:	September 11, 1989
Defendant.	:	

BEFORE: HON. RICHARD S. GEBELEIN, J.

APPEARANCES:

KATHLEEN JENNINGS, ESQUIRE
PETER LETANG, ESQUIRE
JEFFREY M. TASCHNER, ESQUIRE
Deputy Attorneys General For The State

EUGENE J. MAURER, JR., ESQUIRE
and ELIZABETH BARNES, ESQUIRE
for the Defendant.

RICHARDS, LAYTON & FINGER
By: JAMES T. McKINSTRY, ESQUIRE
and DAVID L. FINGER, ESQUIRE
For Intervenor Gannett Co., Inc.

MOTION TO VACATE ORDER

THE COURT: I have considered the arguments that were made this morning and the motion and the papers which were filed with the motion in this case to vacate the Court Order, and the Court makes the following observations with respect to that matter:

The defendant in this action is charged with three counts of first degree murder in what has been alleged to be the serial killings.

As a result of the nature of these crimes, the case has acquired sensational press coverage during the course of the investigation as well as through pre-trial proceedings.

On July 28, 1989 this Court entered an Administrative Order to protect the integrity of the jury selection process. The Order was entered in the light of an unprecedented event in the case of State v. Lynch which was tried by this Court in Kent County. In that case, for the first time in this jurisdiction, the names and addresses and a personal profile of the jurors sitting in a murder case were published by the News-Journal papers.

After that publication, and in the light of the extraordinary and pervasive publicity surrounding this case, this Court's sua sponte ordered that juror selection would be by number rather than by names and that the Juror Qualification Forms returned by the members of the panel would not be released to other participants in this trial.

This Order was made in an administrative fashion pursuant to the authority of Statute and the Court's Jury Selection Plan which recognizes that in appropriate cases such information as Juror Qualification Forms may be kept confidential. That's in 10 Delaware Code, Section 4513.

Likewise, paragraph sixteen of the Jury Selection Plan provides that information with respect to jurors may be kept confidential in appropriate cases.

Finally, I would also note that this procedure is acknowledged as being appropriate in the revised Free Press-Fair Trial Guidelines of the Judicial Conference of the United States. Those guidelines can be found at 87 Federal Rules Decision 525.

The purpose of the Order was to avoid a confrontation such as occurred in the Lynch case, after the News-Journal had

obtained the type of information involved in this case and the State sought to prohibit its publication.

I would add that in that case the Court in its decision denying an Order prohibiting publication, requested the News-Journal to refer to the Delaware Bench-Bar-Press Guidelines for deliberation and to apply some sensitivity in respecting the privacy of jurors in that case. A request that fell on deaf ears. The Court includes at this time, as Court Exhibit 1, a copy of the news article relating to the jurors in State v. Lynch.

Thus, the totally unprecedented action by the News-Journal in the Lynch case required this Court to consider what steps might be possible to protect the jury from potential interference, intimidation and loss of privacy.

This case is expected to last up to twelve weeks and the jurors will be residing at home with attendant risk of interference, intimidation and harassment. The Court entered the Administrative Directive as the least restrictive step possible to protect the jury from potential interference, intimidation and loss of privacy.

It is significant to note that the News-Journal at oral argument concedes that it has no interest in the highly personal information on Juror Qualification Forms as to jurors not chosen to sit in this trial. Rather, they are only interested in such information on those who are actually seated as jurors, a small minority of those involved. In support of their position, they advance the public's right to know who will decide this case. At oral argument they advance no reason as to why that information has been unnewsworthy in thousands of criminal and civil trials over the past twenty-five years, but has now become newsworthy only in a first degree murder case where extraordinary and sensational publicity has been the rule.

The News-Journal contends that the Court should have had a hearing prior to entering its Administrative Directive. That is not the case. The Order relates only to a procedural matter in this Court and designed to act in a reasoned, prophylactic way to avoid the necessity for far more serious, more restrictive or more intrusive steps at a later time.

The Court recognized that a hearing such as this would be required and that likely information obtained from the jurors during the period of voir dire might be necessary to ultimately decide the substantive issues raised by the News-Journal's motion. To make the findings requested by the News-Journal requires the voir dire to proceed. But if the Court proceeds in public naming the jurors and giving their addresses and personal information and should later then decide that that information should remain confidential, it would be required to act as a censor as to what information in the public arena could be published. This is something the Court is loathed to do. To maintain confidentiality until such time as the Court has heard from the jurors and from the press interests allows a decision to be made based upon a factual record and not upon mere speculation.

This Court is already convinced that the case is an extraordinary one because of the publicity that has surrounded the investigation, pre-trial proceedings and the initiation of these jury selection procedures.

It is also unusual because the press is seeking information rarely, if ever, sought in any trial in this jurisdiction.

During the course of these proceedings the Court has sought to accommodate the press in providing reserved seating at the proceedings, by opening the files of this Court as to search warrant applications and by providing the jury selection and individual voir dire in an open courtroom and not in a jury room or chambers as was case not too many years ago.

The Court has balanced the News-Journal's right to gather information as the Supreme Court has recognized, not an absolute right, against the right of the defendant to a fair trial, free from extraneous influences on jurors, against the right of the State to a similar fair trial, as well as the potential expenses of retrials if the jury should become contaminated.

It has also balanced the interests of the three hundred and sixty five members of the public who have been ordered to serve on this jury panel and to their right of privacy as to their personal afffairs and their personal beliefs. These individuals did not

volunteer to become public figures. They were drafted, ordered to be here, and this Court is concerned with their privacy rights as well.

It is unquestionably clear that with extraordinary publicity that this investigation and trial has engendered, and at this time I will make part of the Court's record the articles in the News-Journal from Thursday through Sunday of this past week – they should become Court Exhibit 2 – it has become clear that were the names and addresses of the jurors made public, well-meaning persons associated with the jurors would inevitably ask them questions about the proceedings, about the evidence, about their service on the jury and so on. These jurors would be constantly placed in the position of refusing to talk to these friends and associates who would not understand this behavior, who would not understand the importance of jurors not speaking about the case on which they sit.

In addition, there is a substantial likelihood of a friend or relative expressing opinions that were unsolicited by the juror to the juror before that juror can stop such information from being provided to him or her. Thus, the risk of contamination is great.

The proceedings in this Court will be open. The public, including the commercial press, is free to attend these proceedings. What occurs in public is, of course, public information. The names and addresses of the prospective jurors and their Juror Qualification Forms will remain confidential during the selection proceeding. This is done to protect the jurors from any interference, influence or harassment during that selection process. It is done to preserve the defendant's right to a fair trail free from jury tampering or improper influence. It is done to try to avoid the necessity of a mistrial or retrial should a juror inadvertently become aware of information that precludes his subsequent service on the jury.

A written decision on this motion will be issued as soon as it is possible. That Order will address the substantive issue as to seated jurors based upon the voir dire proceedings and any further argument or affidavits that any of the parties wish to submit to the Court by Wednesday.

This Court recognizes the role of the free press in our society. It also recognizes the burden placed upon the Court by the Constitution, by the laws of this States and even by the Bench-Bar-Press Declaration to insure that a fair trial ensues. The Court does not make the decision lightly, but only after considering and balancing the interests of all the participants involved, including the jurors, who are after all, part of the public as well.

So, at this time the motion to vacate is denied.

As I have indicated, I will hear anything that the parties wish to submit by Wednesday with regard to the issue of seated jurors and with regard to the selection process. That will start at about three o'clock. The Court is in recess till the call of the Court.

EXHIBIT D

IN THE
SUPREME COURT OF THE STATE OF DELAWARE

GANNETT CO., INC.,	:	
Intervenor Below,	:	
Appellant,	:	
v.	:	
	:	
STATE OF DELAWARE,	:	
Plaintiff Below,	:	No. 372, 1989
Appellee,	:	
v.	:	
	:	
STEVEN B. PENNELL,	:	
Defendant Below,	:	
Appellee.	:	

Before CHRISTIE, Chief Justice, HORSEY and HOLLAND, Justices.

ORDER

This 19th day of September, 1989, it appears to the Court that Gannett Co., Inc. has filed a Notice of Appeal from the decision of the Superior Court of the State of Delaware, in and for New Castle County, dated September 11, 1989, denying its motion to vacate an order dated July 28, 1989, concerning public access to the names of the jurors in *State of Delaware v. Steven B. Pennell*, Cr. A. Nos. N88-12-0051, N88-12-0052, and N88-12-0053. The Notice of Appeal, on its face, raises several legal issues.

NOW, THEREFORE, IT IS HEREBY ORDERED that Gannett Co., Inc. is directed to show cause, on or before 4:30 p.m. on Friday, September 22, 1989, why its Notice of Appeal should not be dismissed.

1) Because this Court has no jurisdiction to hear interlocutory appeals in criminal proceedings.

2) Because Gannett Co., Inc. has no right to intervene in a criminal proceeding or standing to appeal from an order of the Superior Court which is entered in such a proceeding.

3) Because, to the extent that Gannett Co., Inc. has standing and this is a permissible interlocutory appeal, the provisions of Supreme Court Rule 42 have not been followed.

IT IS FURTHER ORDERED that the appellees shall file responses to Gannett's answer to this Notice to Show Cause, on or before Tuesday, September 26, 1989 at 4:30 p.m.

BY THE COURT:

_____

Justice

EXHIBIT E

GANNETT CO., INC., Intervenor Below, Appellant,
v.
STATE of Delaware, Plaintiff Below, Appellee,
v.
Steven B. PENNELL, Defendant Below, Appellee.

Supreme Court of Delaware.
Submitted: Sept. 26, 1989.
Decided: Sept. 29, 1989.

Newspaper publisher sought to appeal Superior Court order denying its motion to vacate order that jurors' names in criminal proceeding be kept confidential. The Supreme Court, Holland, J., held that: (1) publisher had standing to seek review of order denying motion to vacate nondisclosure order; (2) publisher had limited right to intervene in underlying criminal proceeding; (3) court had jurisdiction to hear publisher's appeal, under "collateral order" doctrine; and (4) appeal would be expedited.

Order accordingly.

1. Criminal Law 1023½

Newspaper publisher had standing to challenge trial court order denying its motion to vacate order that jurors' names in criminal proceeding be kept confidential; that order arguably affected right within zone of media's protected First Amendment interests. U.S.C.A. Const.Amend. 1.

2. Criminal Law 1023½

Newspaper publisher had right to intervene in criminal proceeding, for limited purpose of protecting its First Amendment rights by challenging order that names of jurors in that proceeding be kept confidential. U.S.C.A. Const.Amends. 1, 6.

3. Criminal Law 1023(3)

Under collateral order doctrine, Supreme Court had jurisdiction to hear newspaper publisher's appeal from superior court order denying its motion to vacate order in criminal proceeding that names of jurors be kept confidential; that order constituted final decision as to publisher. Del.C.Ann. Const. Art. 4, §11(1)(a).

4. Criminal Law 1132

Newspaper publisher's appeal from order denying motion to vacate order in criminal proceeding that names of jurors be kept confidential would be expedited and First Amendment issue raised by publisher were to be addressed and answered, if possible, before criminal trial was completed. U.S.C.A. Const. Amend. 1.

Upon appeal from the Superior Court. The Notice to Show Cause is DISCHARGED.

Richard G. Elliott, Jr., and David L. Finger, of Richards, Layton & Finger, Wilmington, on behalf of intervenor below, appellant.

Jeffrey M. Taschner, Peter N. Letang, and Kathleen Jennings, of the Dept. of Justice, Wilmington, on behalf of plaintiff below, appellee, State of Del.

Eugene J. Maurer, Jr., Wilmington, on behalf of defendant below, appellee, Steven B. Pennell.

Before CHRISTIE, C.J., and HORSEY and HOLLAND, JJ.

HOLLAND, Justice:

Gannett Co., Inc. ("Gannett") filed a Notice of Appeal from an order entered by the Superior Court in a criminal proceeding brought by the State of Delaware ("State") against Steven B. Pennell ("Pennell").[1] This Court directed Gannett to Show Cause why its appeal should not be dismissed. Gannett has filed a response in support of its right to appeal.

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1. *State of Delaware v. Steven P. Pennell*, Cr.A. Nos. N88-12-0051, N88-12-0052 and N88-12-0053.

This Court has concluded that: (1) Gannett has standing to seek review of the Superior Court's order; (2) that Gannett has a limited right to intervene in the underlying criminal proceedings, which gave rise to the Superior Court's order, and (3) that this Court has jurisdiction to hear Gannett's appeal. Therefore, the Notice to Show Cause will be discharged.

Facts

Pennell has been indicted, *inter alia,* on three counts of Murder in the First Degree. If Pennell is convicted, the State has indicated that it will seek to have the death penalty imposed. The parties all agree that the Pennell case has been the subject of extensive pretrial publicity. On July 28, 1989, the judge presiding over the criminal proceedings in the Superior Court entered the following order:

> In order to protect the integrity of the jury in this case [*State v. Pennell*], I am taking the following steps:
>
> 1. I direct the Prothonotary to keep confidential the names of all jurors subpoenaed for this jury panel. The jury information sheet will be available only to the attorneys for the parties. The names will not be released to anyone else.
>
> 2. On jury selection days those jurors who respond will be assigned a number from 1 to 100. Those numbers will be placed on the juror information sheets delivered to the attorneys and the Court.
>
> 3. All jury selection in open Court will be accomplished by numbers and not by name.

On September 7, 1989, Gannett filed a motion to intervene in the criminal proceedings in the Superior Court, alleging that the July 28th order violated its First Amendment Rights. Gannett also filed a motion requesting the Superior Court to rescind that order. The State and Pennell both opposed Gannett's request.

On September 11, 1989, the Superior Court denied Gannett's motion to vacate its July 28th order. Since that date, the

jury has been impaneled. The criminal trial is now in progress. The names of the jurors have not been disclosed to Gannett or otherwise made public by the Superior Court.

Standing

[1] The initial issue which we must address is Gannett's standing to seek review of the Superior Court's bench ruling of September 11, 1989, denying the motion to vacate the order of July 28, 1989. The test of standing is whether: (1) there is a claim of injury in fact; and (2) the interest sought to be protected is arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question. *Association of Data Processing Serv. Org., Inc. v. Camp,* 397 U.S. 150, 153-54, 90 S.Ct. 827, 829-30, 25 L Ed.2d 184 (1970). The *Data Processing* analysis of standing has been applied to media contests of restrictive orders where the media has alleged injury, as Gannett has done in this case. *See United States v. Cianfrani,* 573 F.2d 835 (3d Cir. 1978) (allegation that order closing suppression hearing violated rights to access, receive and gather information about government activities conferred standing); *United States v. Gurney,* 558 F.2d 1202 (5th Cir.1977), *cert. denied,* 435 U.S. 968, 98 S.Ct. 1606, 56 L.Ed.2d 59 (1978) (where trial court arguably affects media's First Amendment rights and order arguably injures media with respect to news gathering, standing is established).

Gannett is the publisher of a newspaper, which is circulated daily within the State of Delaware. The Superior Court's order has arguably affected a right within the zone of the media's interests which are protected by the First Amendment. We find that Gannett has standing to challenge that order.

Free Press/Fair Trial

Pennell argues that the Superior Court's order is a proper exercise of its duty to protect his Sixth Amendment right to a fair trial. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the

State and district wherein the crime shall have been committed. . . ." U.S. Const. amend VI. The right to a jury trial, is applicable to the States through the Due Process Clause of the Fourteenth Amendment.[2] *Duncan v. Louisiana*, 391 U.S. 145, 149, 88 S.Ct. 1444, 1447, 20 L.Ed.2d 491 (1968).

> In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. . . . "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 [75 S.Ct. 623, 625, 99 L.Ed. 942 (1955)]. In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as "indifferent as he stands unsworne." Co. Litt. 155b. His verdict must be based upon the evidence developed at the trial.

Irvin v. Dowd, 36 U.S. 717, 72, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961).

Gannett argues that the Superior Court's order violates rights which are equally fundamental in our jurisprudence and are guaranteed to it by the First Amendment which states that: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I. Those guarantees have been applied, through the Fourteenth Amendment, to invalidate restraints on freedom of the press imposed by the States. *See, e.g., Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). In particular, the First Amendment has been interpreted to interdict restraints imposed by State courts in criminal proceedings. *See, e.g., Craig v. Harney*, 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947); *Bridges v. California*, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941).

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2. That right is also guaranteed by the Delaware Constitution. Del. Const. art I, §4.

It is inconceivable that the authors of the Bill of Rights were unaware of the potential conflicts between the right to a fair trial by an unbiased jury and the guarantee of freedom of the press. *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 547, 96 S.Ct. 2791, 2797, 49 L.Ed.2d 683 (1976). Nevertheless, the authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, i.e., ranking one as superior to the other. *Id.* at 561, 96 S.Ct. at 2804. The United States Supreme Court has held that:

> "if the authors of these guarantees, fully aware of the potential conflicts between them, were unwilling or unable to resolve the issue by assigning to one priority over the other, it is not for [the Courts] to rewrite the Constitution by undertaking what they declined to do."

Id.

Thus, the United States Supreme Court has also declined to establish a priority between the guarantees of the First Amendment and the Sixth Amendments which would be applicable in all circumstances. *Id.* Each case must be examined and decided according to its own facts. *Id.* at 551, 96 S.Ct. at 2799. Consequently, it has become the trial judge's primary responsibility to govern each judicial proceeding in a way that ensures the guarantees of both the First and the Sixth Amendments. *See, e.g.*, Annotation, *Propriety of Order Forbidding News Media from Publishing Names and Addresses of Jurors in Criminal Cases*, 36 A.L.R. 4th 1126 (1985); *Lexington Herald-Leader Co. v. Meigs*, 660 S.W.2d 658 (Ky.1983); *see also* S. Metcalf, *Rights and Liabilities of Publishers, Broadcasters and Reporters* (1982-1989).

Right to Intervene

[2] In the overwhelming majority of criminal trials, there are few threats to either First Amendment or Sixth Amendment rights. *Nebraska Press Assn. v. Stuart*, 427 U.S. at 551, 96 S.Ct. at 2799. However, "when the case is a 'sensational' one tensions develop between the right of the accused to [a fair] trial by an

impartial jury and the rights guaranteed others by the First Amendment."[3] *Id.*

Once the tension between the First Amendment and the Sixth Amendment has developed, there is a need to provide a judicial forum for its resolution. The Maryland Court of Appeals, recently addressing this issue, stated:

> A procedure under which the press appears by motion in the criminal case when an order restricting pretrial publicity is requested, or has been entered, has the advantage of initially presenting the issues to the trial judge for his consideration in the circumstances of the particular case. The trial judge is in a better position than an appellate court to evaluate matters which may be rapidly unfolding before him and in the community in which the criminal case is pending. The trial judge is also the one who must initially consider how effective alternative methods of protecting the fair trial right of the accused might be under the circumstances. Allowing the press to appear by motion in the criminal case also furnishes the trial court with the benefit of argument by an advocate of First Amendment interests.
>
> The principal objection raised to a non-party motion procedure is that it disrupts the orderly progress of the criminal case. Part of this objection is based on the label, "intervention." Obviously the press cannot intervene generally. Any such intervention must be confined to the issues relating to the proposed or existing restrictive order. This limited intervention is available only at the instance of one who asserts that his own, at least arguably existing, First Amendment rights are, or are about to be, violated. Within the foregoing framework, the necessary opportunity to assert First Amendment rights is, in our view, a source of less disruption than a procedure which begins with a separate suit or application for mandamus, mandatory injunction or declaratory judgment.

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3. The parties agree that the Pennell case has become a sensation.

News American Div., Hearst Corp. v. State, 294 Md. 30, 447 A.2d 1264, 1271-72 (1982). We find this reasoning to be persuasive. We agree that intervention by the news media in a criminal proceeding, for the limited purpose of protecting their First Amendment rights, appears to be the most desirable procedure for providing a judicial resolution of those rights, vis-a-vis the competing Sixth Amendment rights of the defendant.

There is no Delaware rule or statute which precludes such intervention. In fact, it has been the practice of the courts to allow it. *See Van Arsdall v. State,* Del. Supr., 486 A.2d 1 (1984); *State v. Shipley,* Del.Super., 497 A.2d 1052 (1985). We hold that Gannett has a limited right to intervene in this criminal proceeding, for the purpose of challenging the order which arguably infringes upon its First Amendment rights. *See News American Div., Hearst Corp. v. State,* 447 A.2d at 1272.

Collateral Order Doctrine

[3] This Court's jurisdiction to hear appeals is set forth in the Delaware Constitution. This Court does not have jurisdiction to hear an interlocutory appeal in a criminal case. Appeals of right are authorized in criminal cases only from final orders. Del. Const. art. IV, §11(1)(b); *State v. Cooley,* Del.Supr., 430 A.2d 789 (1981). Adherence to this rule of finality has been particularly stringent in Delaware in criminal prosecutions because "the delays and disruptions attendant upon intermediate appeal," which the rule is designed to avoid, "are especially inimical to the effective and fair administration of the criminal law." *Di Bella v. United States,* 369 U.S. 121, 126, 82 S.Ct. 654, 658, 7 L.Ed.2d 614 (1962). *Accord, Cobbledick v. United States,* 309 U.S. 323, 324-26, 60 S.Ct. 540, 541-42, 84 L.Ed. 783 (1940).

Similar limitations are imposed upon the federal circuit courts of appeals by 28 U.S.C. §1291. Nonetheless, a number of the Federal Courts of Appeals have held that Section 1291 does not bar an immediate appeal from an order which is entered in a criminal proceeding that implicates the news media's First

Amendment Rights.[4] In reaching this conclusion, those courts have taken the position that, with respect to the news media, such orders fall within the so-called "collateral order" exception to the final judgment rule, and are thus "final decisions." The collateral order exception was first announced in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). In *Cohen*, the Supreme Court defined collateral orders as:

> that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. . . . We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it.

337 U.S. at 546-47, S.Ct. at 1225-26.

We find that, as to Gannett, the order of the Superior Court in the present case "constituted a final decision since it determined a [civil] matter independent of the issues to be resolved in the criminal proceeding itself, bound persons who were non-parties in the underlying criminal proceeding and had a substantial, continuing effect on important rights." *United States v. Schiavo*, 504 F.2d 1, 5 (3rd Cir.), *cert denied*, 419 U.S. 1096, 95 S.Ct. 690, 42 L.Ed.2d 688 (1974). This Court has jurisdiction to hear an appeal from such a final order by the Superior Court. Del.Const. art. IV, §11(1)(a).

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4. *See, e.g., United States v.Gerena*, 869 F.2d 82, 83-84 (2nd Cir.1989); *United States v. Raffoul*, 826 F.2d 218, 221-22 (3rd Cir.1987); *Applications of National Broadcasting Co.*, 828 F.2d 340, 343 (6th Cir.1987); *United States v. Smith*, 787 F.2d 111, 113 (3rd Cir.1986); *United States v. Cianfrani*, 573 F.2d at 844-5. *See also United States v. Corbitt*, 879 F.2d 224, 227 n, 1 (7th Cir.1989); *Matter of New York Times Co.*, 828 F.2d 110, 113 (2nd Cir.1987), *cert. denied*,486 U.S. ____, 108 S.Ct. 1272, 99 L.Ed.2d 483 (1988); *Application of the Herald Co.*, 734 F.2d 93, 96 (2nd Cir.1984).

Motion to Expedite Appeal

[4] Gannett has filed a motion to expedite this appeal. That motion has been held in obeyance by this Court while the Notice to Show Cause was being considered. It is now appropriate to address that motion.

The criminal trial, which is currently in progress, is expected to continue for several weeks. Gannett argues that this appeal should be expedited for two reasons. First, it argues that the Superior Court's July 28, 1989 order constitutes a daily infringement upon its First Amendment rights. Second, Gannett's claims may become moot if the criminal trial is concluded before this appeal.

This Court has determined that the First Amendment issue raised by Gannett should be addressed and answered, if possible, before the criminal trial has been completed. Therefore, Gannett's motion to expedite this appeal will be granted.[5]

Amicus Curiae

In this case, the State and Pennell oppose the position that has been taken by Gannett and have indicated that if this appeal proceeds, they will both argue that the Superior Court's order should be affirmed. In the usual appeal, the merits of the legal issues presented are adequately framed by the competing interests of the parties. However, this is not a usual appeal.

This appeal has been expedited. Therefore, it will be proceeding simultaneously with the criminal trial that is now in progress. The attorneys for the State and Pennell will be required to devote their full time to the merits of the criminal trial on a daily basis. That trial will undoubtedly also require preparation at night and on weekends. Those attorneys now have the additional professional responsibilities which are involved with this appeal. Therefore, the Court has concluded that the interests of justice would be served if an attorney were appointed to file a brief, as an *amicus curiae*, in addition to the briefs filed by the State and Pennell. Supr. Ct.R. 28.

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5. A scheduling conference will be arranged with counsel.

Conclusion

The Notice to Show Cause that was issued to Gannett is DISMISSED. Gannett's motion to expedite this appeal is GRANTED.

EXHIBIT F

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	:	
	:	Cr. A. Nos.
v.	:	IN88-12-0051-0053
STEVEN B. PENNELL,	:	
Defendant.	:	

Date Submitted: September 20, 1989
Date Decided: October 2, 1989

OPINION

Upon Gannett Co.'s motion to intervene. GRANTED. Upon Intervenor's motion to vacate. DENIED.

Kathleen M. Jennings, Esquire, Peter N. Letang, Esquire and Jeffrey M. Taschner, Esquire, (argued) Deputy Attorneys General, Department of Justice, Wilmington, Delaware for the State.

Eugene J. Maurer, Jr., Esquire, (argued) and Elizabeth Barnes, Esquire, Wilmington, Delaware for the defendant.

Richard G. Elliott, Jr., Esquire, James T. McKinstry, Esquire, (argued) and David L. Finger, Esquire of Richards, Layton & Finger, Wilmington, Delaware for Intervenor, Gannett Co.

GEBELEIN, Judge

The defendant in this action is charged with three counts of First Degree Murder, in what is alleged to be serial killings. Autopsies revealed that two of the female victims were struck in the head with a cylindrical object, were strangled, had ligature marks on their wrists and ankles, had injuries to their nipples from a pinching-type tool, such as pliers or a vise-grip, and had residues of duct tape in the area of their faces and hair. The third victim, though not beaten in the head or strangled, had a nipple

cut off, bruises to her buttocks (similar to those found on one of the other victims), and there was evidence that she, too, had been bound.

Because of the nature of these crimes,[1] the case received both national and local press coverage during the investigation as well as during pre-trial proceedings. While the investigation was underway, the local press published details of the crimes and warnings to women about the area. After the defendant's arrest, additional coverage occurred in the local press. Also, a national television show broadcasted details of the crimes and ran footage of the defendant's arrest, as did local television stations.

At the time of the suppression hearing in this case, March, 1989, the Court had become sensitive to the amount of media coverage generated by this unique case. See Appendix A for a listing of the articles in the *News Journal* alone through March 4, 1989. Consideration was given at that time to cloture of the suppression hearing; but, since the trial was six months away and steps could be taken to provide an unbiased jury, the hearing was conducted open to the public. Additional daily news coverage followed. During the summer months a hearing was conducted relating to the evidentiary issues surrounding DNA identification, again daily media coverage followed. These hearings, due to the schedules of expert witnesses, continued to the eve of trial. All of these pretrial proceedings were conducted in an open fashion, guaranteeing the public and the commercial press free access to all that occurred in this proceeding.

On July 28, 1989, however, this Court entered an administrative order directing the Prothonotary to keep the names of those jurors subpoenaed for this petit jury panel confidential. See, Appendix B. This administrative order was entered as a precautionary measure in light of the unprecedented news coverage attendant to this trial; and in light of the *News Journal's*

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1. It should be noted as well that there were at least two other disappearances linked to this case through the investigation for which the defendant was not indicted. The body of one of those individuals was found; the other is still missing. Press coverage has continually linked these disappearances to the defendant.

unprecedented actions in publishing juror profiles of the jurors selected in *State v. Lynch,* Del. Super., IK88-01-0040-47. See, Appendix C.

On Friday, September 8, 1989, Gannett Co., Inc., publisher of the *News Journal* ("intervenor"), filed a Motion to Intervene and a Motion to Vacate the Order of July 28, 1989. On that same date, this Court agreed to hear the intervenor's motions on the following Monday, September 11, 1989.

On September 11, 1989, an open hearing was held on the intervenor's motions, with counsel for the State and the defendant present. All parties were afforded the opportunity to express their positions on the intervenor's motions. This Court, in an open hearing several hours later, issued a bench opinion granting the intervenor's Motion to Intervene and denying at that time the intervenor's Motion to Vacate the order requiring the names of potential jurors be kept confidential. The jury selection procedure was completed on September 18, 1989 and a jury of twelve with six alternates was selected. In accordance with this Court's bench ruling of September 11, 1989, the Court has received and considered affidavits from Gannett with respect to their motion to vacate, the last being filed September 20, 1989.

MOTION TO INTERVENE

Motions to intervene in criminal and civil cases by the media have been recognized by Delaware Courts as a proper method of asserting public rights of access to information in judicial proceedings. *C. v. C.,* Del. Supr., 320 A.2d 717 (1974) (media allowed to intervene in divorce proceeding where media sought access to divorce records, but was denied access to the records based on privacy concerns); *State v. Shipley,* Del. Super., 497 A.2d 1052 (1985) (media permitted to intervene to oppose motion excluding public and media from bail hearings, remanded to Superior Court for *in camera* offers of proof to ensure potentially prejudicial material was not prematurely revealed); *State v. Lynch,* Del. Super., IK88-01-0040 through 0047, Ridgely, J. (June 2, 1989) (media permitted to intervene in motion to vacate order barring press from publishing jurors'

names and information on jurors information cards; order was vacated only to the extent of jurors' names which were made public during *voir dire*). These decisions recognize that access rights of the media are identical in scope to those rights of the general public and intervention by the media may provide the only means of reviewing allegations of abridgement of the public's right of access to information. Therefore, this Court GRANTS the Motion to Intervene.

MOTION TO VACATE ORDER BARRING ACCESS TO JURORS' NAMES

In fashioning an administrative order requiring that juror names be confidential and that juror qualification forms returned by panel members be released only to trial participants, this Court relied upon its statutory authority to use discretion in releasing jurors' names. 10 *Del. C.* §4513(a). This section provides that:

> The names of persons summoned for jury service shall be disclosed to the public and the contents of jury qualification forms completed by them shall be made available to the parties unless the Court determines that any or all of this information should be kept confidential or its use limited in whole or in part in any case or cases.

In issuing an administrative order to protect the integrity of the jury selection process in this unique case, this Court concerned itself, in part, with the unprecedented action of the media in *State v. Lynch*.

In *Lynch*, during jury selection, the prospective jurors' names were announced in open Court before individual *voir dire*. There had been, at that time, no indication the media would publish names and profiles of individual jurors during trial. As the *Lynch* Court noted, the press had never previously published jurors' names, not to mention addresses and personal, private information. On learning that a reporter for Gannett Co., Inc. was seeking information on the jury, the State and defendant in *Lynch* expressed to the Court their concerns that someone seeing the jurors' names in the paper would approach

the jurors or make unsolicited phone calls to jurors offering advice about what a juror should do in the case. Because of the extensive pre-trial publicity in that capital case, where the defendant was charged with killing the parents during the abduction of their infant child, the State was concerned that the jurors' impartiality might well be effected. It also believed that jurors in future notorious cases would be less willing to serve if they were aware that they would become part of the case media story individually and by name, as opposed to collectively as a jury. Following an *in camera* proceeding, the *Lynch* Court ordered that the names be kept confidential. The Court based its authority on the "Plan of the Superior Court of Delaware for the Random Selection of Grand and Petit Jurors," §16 ("Superior Court Plan"). That section provides that names drawn from the qualified jury wheel shall be disclosed unless the presiding judge orders them to be kept confidential in any case where the interests of justice so requires. Appendix D.

Gannett Co., Inc. moved to intervene in the *Lynch* case and vacate the order, contending that the order was an unconstitutional prior restraint because it barred publication of jurors' names known to it through attendance at open Court proceedings. The State and the defendant opposed the motion and asked for a prior restraint order. The Court refused to vacate the order on the grounds that it was a prior restraint. It determined that the order was restrictive in nature. It noted "a great difference" between an order constituting prior restraint and a reasonable, prophylactic measure designed to restrict non-public information by counsel and the Court's own staff.

Prior restraint orders directly prohibit or restrain publication of information already gained or commentary on judicial proceedings held in public. Restrictive orders, however, are not prior restraint on the press' or public's right to speak or publish; rather they restrain trial participants from certain conduct, thereby proscribing the informational flow to non-trial participants. *Lynch, supra* at 5 (citing *Central South Carolina Chapter v. Martin*, 431 F. Supp. 1182, 1188 (D.S.C. 1977) (order preventing trial participants from releasing jurors' names not prior restraint), *aff'd* 556 F.2d 706 (4th Cir., 1977).

The Court did, however, deny the State and defendant's joint motion for a prior restraint order because the Court was not persuaded that there was an evidentiary basis on which to conclude that a prior restraint was the only means to protect jurors from invasion of their privacy or inappropriate contact during the trial, or the only means to guarantee a fair trial.

In *Lynch,* the Court also denied the intervenor access to juror questionnaires because the Court determined they should be kept confidential. The Court held that the questionnaires were not public records, unlike the jurors' names had already been given in open Court, based on its interpretation of 10 *Del. C.* §4513 and Superior Court Plan §16. The Court reasoned that jurors would be adverse to having personal details revealed by publication of questionnaires which they were compelled to answer under penalty of contempt. See Appendix E, juror questionnaire. The Court was convinced that the disclosure might result in juror harassment or attempts at retribution or intimidation. This Court agrees.

In reaching its decision to allow publication of the jurors' names in *Lynch,* the Court noted that such publication was without precedent in Delaware, even in the most notorious criminal trials. It urged the intervenor to give careful consideration to the "Bar-Bench-Press Declaration of Delaware," §5, which states that news representatives should consider whether publication of information would subject anyone to an unwarranted invasion of privacy. *See also, ABA Standards on Trial by Jury,* Section 15-3.7(a):

> News representatives should consider whether publication of information derived from such records would subject *anyone* to an unwarranted invasion of privacy. (Emphasis added.)

Following this decision, the intervenor published the names. It not only published the names, but provided its own profile of the jurors. This profile remarked on the appearance of the individual jurors in a manner that can only be described as unflattering and possibly demeaning in some instances. For example, it referred to jurors as "balding", "short and round",

"stout" and having a "stern expression". The jurors became aware of the article and one juror was removed. During the trial, the Court also issued an order prohibiting photographs of jurors and a *News Journal* photographer defied that order.

The Court, as noted *supra*, had been concerned about the possibility of affording the accused a fair trial in light of the overwhelming publicity mounting in the case.

In light of Gannett's action in *Lynch* and other considerations discussed below, this Court, under its discretionary authority, issued an administrative order directing the Court's staff and the parties to keep prospective jurors' names confidential. Subsequently, Gannett, the intervenor, moved this Court to vacate that order.

Intervenor argued in support of its motion that: (1) the order requiring the Prothonotary to keep the names confidential violates the intervenor's right of access to judicial records and (2) the order requiring that jury selection occur without announcing the jurors' names is unconstitutional.

In arguing that the order to the Prothonotary violates the intervenor's right of access to judicial records, the intervenor claims a right of access under the common law which is codified as Delaware's Freedom of information Act ("FOIA"), 29 *Del. C.* §10001-10005, statutory rights under 10 *Del. C.* §4513 and the Federal and State Constitutions.

Delaware's FOIA defines "public record" as "written or recorded information made or received by a public body relating to public business."§10002(b). However, it further states that records that are not deemed public include "[a]ny records specifically exempted from public disclosure By statute or common law." §10002(6). The rules of statutory construction require that for consistency in effectuating the manifest interest of the General Assembly laws be construed with reference to each other to retain the viability of pre-existing law. 1 *Del. C.* §301; *Silverbrook Cem. Co. v. Board of Assmt. Review*, Del. Super., 355 A.2d 908 (1976) (aff'd in part and rev'd in part, Del.Supr., 378 A.2d 619 (1977)). Thus, in ascertaining if the names of jurors are exempt from the definition of public records, the Court looks to 10 *Del. C.* §4513(a), effective July 9, 1975,

which states that jurors' names will be disclosed unless the Court determines that any or all of the information should be kept confidential or its use limited. Further, §4513(b) requires that records used in the juror selection process not be disclosed, except in accordance with the jury selection plan.

The Superior Court Jury Plan §16, in effect since 1976, has a provision mirroring 10 *Del. C.* §4313(a) which states that information about jurors shall be available unless the Court determines that in the interest of justice the information should be kept confidential.

Reading the FOIA in conjunction with 10 *Del. C.* §4513(a) and (b) and the Superior Court Jury Plan §16, this Court concludes that the Court clearly has the authority to keep jury lists confidential and that when the Court determines the lists should be confidential, then records relating thereto are not public records under the FOIA. The interpret the definition otherwise would preclude the Court from ever exercising the discretion to make such records confidential specifically granted it by the General Assembly; in effect, repealing the pre-existing statute that allows such a determination. Repeal by implication is not favored in Delaware. *C. v. C.*, at 721. *See also, Lynch, supra,* denying media access to juror qualification forms under 10 *Del. C.* §4513 and Superior Court July Plan §16; *Nixon v. Warner Communication, Inc.*, 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978) (Supreme Court upheld decision precluding release of certain tapes to media, holding that the common law right of access is one best left to sound discretion of the trial court, to be exercised in light of the relevant facts and circumstances); *United States v. Gurney.* 558 F.2d 1202 (5th Cir. 1977) *rehearing denied,* 562 F.2d 1257, *cert. denied sub nom. Miami Herald Pub. Co. v. Krentzman,* 435 U.S. 918, 98 S.Ct. 1606, 56 L.Ed. 2d 59 (1978); *Central South Carolina Chapter* at 1187 (jurors' names and addresses not public information); *Revised Free Press – Fair Trial Guidelines of the Judicial Conference of the United States – 1980,* 87 F.R.D. 518, 530 (1980) (recommending that in a widely publicized or sensational criminal trial the Court issue, *sua sponte* or on the motion of the parties, special orders such as directions that names and addresses of

jurors or prospective jurors not be publicly released except as required by statute). *But see, Des Moines Register v. Osmundson*, Iowa Supr., 248 N.W.2d 493 (1976) (jury list was a public record to which media was entitled under FOIA statute where defendant did not point to statute exempting the lists and argued a non-statutory exception for jury lists).

The intervenor argues that there is nothing on the record to indicate that any of the above authority was considered when the Court issued its administrative order and to make such a determination at this stage would be an improper *ex post facto* determination. The Intervenor notes that the reason such authority is not on the record is because the Court, *sua sponte*, issued the order without providing notice and opportunity to be heard before it issued the order.

The Court finds this argument both illogical and not grounded in law. If the order were issued only after a hearing on whether the list should be confidential, the list which must be compiled months in advance would have been available until the hearing was held. This would have resulted in the prospective juror's names being made public, precluding any subsequent consideration of the privacy interest of the jurors, the impartiality of prospective jurors if their names became associated with a highly publicized case and the impact, if any, on the defendant's right to a fair trial. This Court had to take such steps as necessary to address these concerns, in view of previous decisions that held that once the jurors' names have become public, the privacy concerns of the jury are no longer a valid argument. *Lynch, supra*, (allowing publication of names after they were made public in *voir dire* to avoid prior restraint on the press); *Commonwealth v. Genovese*, Pa. Super., 487 A.2d 364 (1985) (Court of Appeals held State's concern for juror privacy not permitted where information was available to public at open *voir dire* proceeding); *Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1306, 130 S.Ct. 3524, 3527, 77 L.Ed.2d 1284, 1288 (1983); *see also, Nixon, supra*, factor to weigh in sealing documents is whether public already has access to the information). Intervenor's approach would result in the Court being relegated to "locking the barn door after the horse has escaped." *United*

States v. Persico, 621 F. Supp. 842, 880, 879 (D.C.N.Y. 1985) (granting the government's motion for an anonymous jury and segregation of the jury, under the authority of the District Court's Plan for Random Selection of Grand and Petit Jurors.)

Thus, this Court does not agree that the intervenor should be given notice and an opportunity to be heard before the Court could issue such order. *Central South Carolina Chapter* at 1191.

Indeed, to whom would notice of such a pre-order hearing be directed? Gannett is a major news organization in Delaware; but, each and every newspaper, radio station, magazine or television studio lays equal claim to represent the public as to public access rights. This Court entered the administrative order on July 28, 1989 and *filed* it on July 31, 1989 in the publicly accessible file in this case. The Court was well aware that media read these files and could take action, as they did, to seek to vacate the order. On intervenor's motion to vacate the order, the Court promptly heard the oral arguments of the intervenor, the State and the defendant. In fact, the hearing was heard on the Court's first business day after the motion was filed.

The intervenor argues that the order is a prior restraint on the right of access and as such it has First Amendment implications. Orders found to be a prior restraint include those preventing any person from printing or announcing in any way the names or address of jurors and orders prohibiting "reporting" on certain subjects. *Genovese* at 367 (a prior restraint prevents publication of information or material in possession of the press); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976). This Court, however, concludes that the order is not a prior restraint, but rather a restrictive order for the reasons articulated above and in *Lynch, supra.* This order, like the *Lynch* order, directs that the Prothonotary keep the names confidential. It does not preclude the press from publishing anything. It only restricts court personnel from divulging juror names. *Lynch* at 5. *See also, Central South Carolina Chapter, supra.*

Assuming, however, that there are First Amendment implications of right of access, this Court now considers the

standards for closure motions. *Shipley, supra.* In *Shipley,* when the defendant was charged with first degree murder and possession of a deadly weapon during the commission of a felony, the Delaware Superior Court determined the legal standard for determining whether a bail hearing should be closed. The Court held that the "overriding interest likely to be prejudiced" was defendant's right to a fair trial. *Id.* at 1055. It defined the term "likely" as equivalent to "reasonable probability" or "a reasonable likelihood" standard. While the confidentiality of a jury list explicitly permitted by statute is not the same as the closure of a bail hearing,[2] we will, however, apply the *Shipley* standard for the sake of argument.[3]

The *Shipley* court suggests several methods to assure a fair trial in the face of pervasive pre-trial publicity, including a change of venue, postponement of the trial, searching questions of prospective jurors, and the use of emphatic and clear instructions to the jurors. *Id.* These considerations have support in other case law. *See, Associated Press v. United States Dist. Ct. for Cent. Div. of Cal.,* 705 F.2d 1143 (9th Cir., 1983) (preventing blanket sealing of *all* documents filed in a criminal case

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2. In deciding that right to access extends to pretrial detention hearings and documents, Courts have recognized that the right was not absolute, but that such decisions benefit from public scrutiny because of the impact on an individual's liberty. *See, Seattle Times Co. v. United States' Dist. Ct. for the Western Dist. of Wa.,* 845 F.2d 1513 (9th Cir., 1988) (pretrial release decisions benefit from public scrutiny because the decision to hold a person presumed innocent is one of major importance to the administration of justice.)

3. The Court is also aware of the cloture standard adopted in *Press-Enterprise Company v. Superior Court of California,* U.S. , 106 S.Ct. 2735 (1986). That case established a higher burden for cloture of a preliminary hearing "as conducted in California" *id.* at 2741, where preliminary hearings are a matter of right and apparently in many cases are the "final and most important step in the criminal proceeding". *Id.* at 2742. In that case, 41 days of hearings were closed to the public. Under those unique facts, the Courts said that cloture would be justified only upon "a substantial probability" that the opening of the hearings would deny the accused a right to a fair trial. The Court specifically noted that public access is not absolute. *id.* at 2740; and further that interest of others than the accused may be implicated. *Id.* at 2741, fn.2.

where less restrictive methods were available including a population base of more than a million jurors to draw from); *Nixon, supra,* (factors to weigh in sealing documents are whether records are sought for improper purpose, whether release would enhance public's understanding); *Press-Enterprise Co. v. Super. Ct. of Cal.,* 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (prospective jurors' privacy interest may require transcript be sealed or name be withheld to protect the person from embarrassment).

This Court, in issuing the administrative order, concerned itself with the defendant's right to a fair trial and how the release of jurors' name could impact on those rights.

Prior to entering the July 28th order, the Court read various newspapers, watched and listened to reports on the broadcast media, had surveyed the newspaper coverage through March 4, 1989 and took notice of the widely publicized and sensational nature of the case. It also noticed the numerous inquiries made by the press to this Court concerning this particular case.

Specifically, the Court weighed this extensive pre-trial publicity, the lurid and violent nature of the crimes; the size of the population from which prospective jurors could be drawn; whether the release would enhance the public's understanding of the trial; the estimated length of the trial; the opportunity to question prospective jurors on how release of their names might affect impartiality; and allow the Court to determine whether prospective jurors had privacy concerns that might cause them embarrassment if their names were released. In response to questioning at *voir dire*, 5 prospective jurors felt they could not be fair if their name was released; and 14 volunteered that they did not want their names published, including two jurors seated on the petit panel. None of the jurors was advised that their addresses and a profile could appear, nor that Gannett sought their qualification forms.

The Court found that for more than a year this case has been covered by the local press and by the national press. This coverage included the facts that the victims were bound and their nipples mutilated by a pinching-type tool, and that the

press had consistently linked the defendant to the disappearance and/or death of persons other than those charged in the indictment. The Court considered the emotional nature of families and friends of victims in this case.[4] Considering the repeated publication of these and other details of a lurid crime in conjunction with the small population base from which jurors in New Castle County may be drawn,[5] the fact that the trial is estimated to last for 12-15 weeks; the cost of the trial which will likely approach $500,000; the fact that jurors could be subjected to the type of coverage experienced in *Lynch* where television crews followed jurors to lunch and photos were taken during the period of jury deliberation, this Court concluded that the names should be kept confidential.

The least restrictive means to ensure the defendant's right to a fair trial and the jurors' privacy was to advise the prospective jurors in their subpoena not to read about the case and further to issue the administrative order prohibiting disclosure of the names.[6]

This method was the least restrictive because consideration of the other alternatives illustrates:

1.) Postponement would not guarantee that the publicity would cease and was not a viable option with respect to expert witness schedules, more than 100 lay and police witnesses are already scheduled to be available at the scheduled time, and the defendant's incarcerated status (since November, 1988);

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4. Subsequent to the trial being initiated, the Court had to enhance physical security measures because of purported threats of violence by an individual. This incident itself was reported by the media and involved a friend of one of the purported "non-charged" victims.

5. Estimated New Castle County population for 1987 was 424,800. *Delaware Dateline*, Fall '88.

6. It should be noted that jury *voir dire* procedures in Delaware courts do not have a history of openness. In fact, currently in virtually all criminal and civil trials, the individual *voir dire* of jurors, if any, is conducted at side bar, rarely with a record kept of the personal information discussed by the jurors, counsel and the Court. While the jurors' names are routinely announced, their privacy is respected by having their answers to publicly asked questions taken at side bar. In capital cases, on many occasions, all or some of the individual *voir dire* have in the past been conducted in a jury room.

2.) The jurors have concerns that their names would become part of the story and that they might be harrassed, intimidated or contacted by people who, inadvertently or deliberately, wanted to affect their deliberations during the trial.[7]

3.) Because of the widespread publicity, the pervasiveness of *New Journal* circulation, and the small size of this State, a change of venue also is not the proper solution. The concerns articulated above would still have force.

4.) This Court rejected sequestration as an alternative because it would impose extreme hardships on the jurors, particularly in light of the anticipated duration of the trial. Likewise, the cost of pre-deliberation sequestration of eighteen jurors and alternates would likely approximate $250,000 for a twelve to fifteen week period. An administrative order keeping the names confidential allows the Court to determine if the more drastic remedy of sequestration is necessary, thus minimizing the burden on jurors and avoiding unnecessary expense to

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7. As one potential juror explained at individual *voir dire*:

Q. Would your ability to render a fair and impartial verdict be influenced by the possibility that your name might appear in the local news media?

A. That would bother me. I don't know if it would affect my ability, but I am concerned that that publicity would subject me to harassment or possible members of the family. I have a name that is unique, one of a kind in the phone book.

Q. But do you feel that you could sit back and judge the evidence fairly and impartially in spite of the fact that that may occur?

A. If there were no influences or harassments that happened because of that or to my wife. She is in front of people, she works and if somebody starts making comments to her that might affect me.

Another juror seated in this case:

A. I would not like my name in the paper.

A juror excused for cause:

A. I don't want my name to appear anywhere. None of their business.

Q. Would it influence you?

A. I suppose so.

The Court must consider how many jurors, none of whom have even been subject to this type of notoriety, would respond to innocent or non-violent comments by neighbors, friends and relatives.

taxpayers, yet insulating jurors so far as possible from inappropriate contact or embarrassment, making it less likely that the jurors would harbor resentment against the defendant or the government and, thus, be able to render an impartial verdict. *Persico* at 880.

5.) This Court also considered the option of closing *voir dire* to the public when jurors were asked personal data or information. *Voir dire* in this case has asked the jurors the following extremely personal information:

> **Q.** Have you or any member of your family or close friends ever been the victim of a crime?
>
> **Q.** Have you or any member of your family or close friends ever been accused of a crime?
>
> **Q.** Have you or any member of your immediate family ever appeared as a witness before a Grand Jury?
>
> **Q.** Are you conscientiously opposed to the death penalty?

The jurors are expected to answer these questions truthfully. Thus, potential jurors in this case revealed family members who had been victims of crimes,[8] their opinions on the death penalty, and that they, themselves, had been accused of crimes, answered affirmatively by several jurors and noted in the press. This information given freely by an anonymous juror could well be embarrassing to a profiled juror. To publicly reveal the names of these jurors would likely have a chilling effect on truthful answers to these questions unless *voir dire* were conducted *in camera*.

The Court concluded that it would be *more* restrictive to preclude the public from knowing the reasons why jurors were challenged by excluding the public from *voir dire* than it would be to restrict access to their names, addresses and qualification forms.

Thus, this Court adopted the method suggested by Justice Thurgood Marshall in *Press-Enterprise, I, supra* at 520:

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8. These victims included those of simple thefts to a battered woman.

> The constitutionally preferable method for reconciling the First Amendment interests of the public and the press with the *legitimate privacy interests of jurors* and the interests of defendants in fair trials is to redact transcripts in such a way as to preserve the anonymity of jurors while disclosing the substance of their responses. (Emphasis added).

6.) Finally, in order to preserve the State's interest in obtaining a final conclusion to this trial without undue delay or expense, the Court considered releasing the names of jurors upon the posting of a bond by intervenors, to cover the costs of a retrial should its publication of jurors' identities lead to contamination of the jury. Such a bond, in the neighborhood of $500,000, would protect the taxpayers and some of the State's interests. It would not, however, protect the interests of over a hundred witnesses, who would have to testify again, with the painful memories that testimony would invoke for many, nor would it protect the accused's right to a speedy determination in this case.

In *Persico,* the Court granted the government's motion to a limited *voir dire* and an anonymous jury. The Court stated that courts must protect the integrity of criminal trials and that the anonymous juror feels less pressure, which is a factor contibuting to impartiality. The Court rejected the idea of sequestration, electing to suggest that instructions be given to the jury that the Court was trying to prevent a curious media from prying into their personal affairs or interfering with their duty to consider only the evidence at trials. *Id. See also, United States v. Thomas,* 757 F.2d 1359 (2d Cir., 1985); *United States v. Barnes,* 604 F.2d 121 (2d Cir. 1979), *cert. denied,* 446 U.S. 907, 100 S.Ct. 1833, 64 L.Ed.2d 260 (1980) (anonymous jury granted and factor to consider is pretrial publicity which would enhance possibility jurors' names would become public and thus expose them to intimidation by defendant's friends or enemies, or harassment by the public); *United States v. Borelli,* 336 F.2d 376 (2d Cir., 1964) *cert. denied* 379 U.S. 960, 85 S.Ct. 647, 13

L.Ed.2d 555 (1965) (anonymous jury granted where unsigned letters directed jurors to find defendants guilty).

While many cases involving anonymous juries are organized crime cases and intervenor suggests that only organized crime cases have resulted in orders precluding the release of jurors' names, this Court notes *United States v. Gurney*, 5th Cir., 558 F.2d 1202 (1977) *cert. den.* 435 U.S. 968 (1978) and *Shuster v. Bowen*, D. Nev., 347 F. Supp. 319 (1972) vacated as moot, 9th Cir., 496 F.2d 881 (1974) which did not involve organized crime and in which names and addresses of jurors were withheld. Additionally, 10 *Del. C.* §4513 does not limit the Court's consideration to such cases for it provides that jurors' names can be confidential "in any case or cases" where the Court determines the need. *The Revised Free Press - Fair Trial Guidelines of the Judicial Conference of the United States — 1980*, cited in intervenor's brief, states that in widely publicized or sensational criminal cases, the Court may on the motion of either party or on its own motion issue a special order, including directing the names and addresses of jurors be kept confidential. *Id.* at 529-30. The Committee Comment, as its example of where special orders should be considered, cites *Sheppard v. Maxwell*. *Sheppard*, of course, was not an organized crime case, but a murder case where the defendant, a doctor, was accused of bludgeoning his wife to death. *Id.*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966) (habeas corpus granted because trial judge did not fulfill duty to protect defendant from prejudicial publicity by not exercising his authority to control parties, court staff and media.)

Likewise, the United States Supreme Court in *United States v. Blackwell*, 421 U.S. 997, 95 S.Ct. 2489, 44 L.Ed.2d 674 (1975) without opinion, declined to set aside an order by a Texas trial judge preventing the media from publishing jurors' names in a notorious murder trial without organized crime connections in spite of the fact that such an order was a prior restraint since the media had obtained the names from juror slips.

More recently, in Delaware, the Superior Court, in a non-organized crime case, ordered that the jurors' names and

juror information not be released. That Court vacated the portion of the order relating to jurors' names because they had already become a matter of public record during open *voir dire.* It refused to vacate that portion of the order that prohibited release of juror questionnaires because it was not a matter of public record. *Lynch, supra.* This Court has previously cited in this opinion other non-organized crime cases where such measures were used, but the order was not upheld because the information was released during *voir dire* and as a result was found to be a matter of public record. Precluding publication of such public domain information would be a prior restraint requiring a compelling governmental interest.

This Court recognizes there are extremely limited instances for use of such orders and that is as it should be because the Court must evaluate the interests of the defendant, State and jurors on a case-by-case basis and limit such methods to situations where the opposing rights override the value of openness.

The Court finds, however, that in this extraordinary case because of the pervasiveness of the publicity in this case, there is a substantial probability that should the jurors' names be made public, good intentioned people will attempt to talk to the jurors or their families about this case. There is a substantial likelihood that people will express their opinions to the jurors before the jurors can warn them off. This leads to a substantial probability that jury contamination will occur.

The intervenor, in its oral argument, relied basically on two cases it believed to be helpful in weighing the defendant's rights against the value of openness. *In re Baltimore Sun Company,* 841 F.2d 74 (4th Cir. 1988) and *Press-Enterprise Co. v. Super. Ct. of Cal.,* 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 624 (1984).

In *Press-Enterprise,* the defendant was tried and convicted of the rape and murder of a teenage girl. Before *voir dire, Press-Enterprise,* intervenor, moved for an open *voir dire.* The trial judge permitted the intervenor to attend only the general *voir dire* and closed the individual *voir dire* that addressed juror qualifications with regard to the death penalty and other special areas that counsel felt should be private. The *voir dire* lasted six

weeks and all but approximately three days were closed to the press and public. After the jury was empaneled, the intervenor sought the *voir dire* transcript. The trial judge denied access to the transcript. The Supreme Court held that guarantees of open criminal proceedings apply to *voir dire* examinations and that the trial court could not constitutionally close all but three days of *voir dire* to protect privacy interests of prospective jurors without considering alternatives to closure and without articulating findings to support such a broad order.

The Court's rationale was that the process of juror selection has presumptively been a public process with exceptions only for good cause shown[9] and that the trial court's prolonged closure was unsupported by findings. The Court noted that the trial judge closed "an incredible *six* weeks" of *voir dire* without considering alternatives and that it declined to release the transcripts after stating that the answers were mostly "dull and boring." *Id.* at 825.

The Court said the judge provided no explanation of why the broad order was not limited to information deserving of privacy, nor did he consider whether he could disclose information while preserving anonymity of the jurors. Other alternatives included giving the jurors an opportunity to present specific problems to the judge *in camera* with counsel present and on the record. It said that Constitutional requirements of the First Amendment could be later satisfied by making the transcript available within a reasonable time, if the judge determined closure could be accomplished while safeguarding valid privacy interests.

Press-Enterprise recognized that "no right ranks higher than the right of the accused to a fair trial." *Id.* at 823. It noted that closure may be warranted in limited circumstances when the trial judge determines that in the interests of justice reasonable limitations on access to a trial may be imposed.

Press-Enterprise does not hold that the public has an absolute right to attend trials or *voir dire* proceedings, but

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9. As discussed at fn 6, *supra* there is no long-term historical precedent in Delaware for public individual *voir dire* of jurors in criminal trials.

rather that closure should be as limited as possible to allow open hearings, while considering the accused's rights to a fair trial.

The Court stated that the accused's right to fundamental fairness in jury selection is a compelling interest. *Id.* at 824. Recognizing that compelling interest, this Court applied one of the alternatives suggested by the United States Supreme Court in *Press-Enterprise* – keeping the jurors' names anonymous. Additionally, in *Press-Enterprise,* the closed *voir dire* prevented the public from hearing the Court inquire into the jurors' qualifications on the death penalty. By keeping the jurors' names anonymous here, but by having an open *voir dire* proceeding, this Court has allowed the public and commercial media the opportunity to observe such inquiries. This opportunity was used by intervenor as evidenced by the numerous articles relating the jury selection process and spelling out the answers given by jurors to highly personal questions.

The intervenor also cited *In re Baltimore Sun,* as requiring that the names of jurors be made available. That case is clearly distinguishable from the present case on both the law and the facts. In *Baltimore Sun,* the Court interpreted a federal statute that protected the disclosure of contents of records or papers used by the clerk in connection with the jury process after the jury is seated. *Baltimore Sun* does not ground in the First Amendment or other constitutional law. It is based upon a Federal statute, which is not applicable in this case. Additionally, in *Baltimore Sun,* the names became a matter of public record during open *voir dire,* a fact that is not applicable here.

The *Baltimore Sun* Court believed that sequestration or change of venue was a possible method of obviating pressure on prejudice in criminal trials, clearly a much more viable solution in the Federal Court system, where venue has more meaning. For the reasons previously stated, this Court does not consider those methods the least restrictive when anonymity, as suggested in *Press-Enterprise* and other cases, is available.

The intervenor argued that jurors' names are needed so that the public can understand the judicial process; but offers no reason why that is not equally true in organized crime cases where it concedes such names may be withheld. The criminal

justice process has recognized by statute and case law, that the Court may in extraordinary cases keep jurors' names confidential, close parts of proceedings, and restrict access to other evidence that is not admitted at trial. The public has a right to understand that the judicial process allows these procedures to ensure that those brought before the Court as defendants may be guaranteed an impartial jury.

Intervenor argued that the order is inappropriate because it does not serve "one of its purported purposes,"[10] that of keeping "friends, neighbors, relatives and the world at large" from exposing jurors' views, harassing or intimidating jurors. However, the order does prevent "the world at large" from picking up the phone book, looking for the names of jurors and calling or writing them. Certainly, it does not prevent friends and neighbors from knowing who the jurors are if their photos are published. But as the Court has noted, the order as written is the least restrictive measure, which could be taken to assure the privacy of the jury and to limit the chance of contamination. Should the Court determine that more restrictive measures are necessary, it may have to implement additional orders, such as restraints on photographs or sequestration of jurors.

The criminal justice system must also recognize that the public, as prospective jurors, have privacy concerns that the Court will weigh before it subjects them to becoming part of the story in a lurid, highly publicized case. It is important that the public knows that their privacy may be respected so that they will readily participate when they are subpoenaed by the Court to fulfill their obligation. The public does not seek this duty; the Court demands it subject to contempt of court proceedings should the prospective jurors not comply. 10 *Del. C.* §4516. The public, as prospective jurors, have a right to know that the Court will not needlessly impose additional burdens on them.

Finally, the Court in entering this order is not only concerned with the potential for jury contamination by well-intentioned or ill-intentioned members of the public. The Court

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10. Affidavit of Catherine Matusiak, news anchor and assistant news director of First State News, Channel 2, Heritage Cablevision.

must also be concerned with the integrity of the jury selection process. Thus, the Court proceeded with a numerical designation to allow potential jurors to speak freely and with no inhibitions about their most private matters in a *public voir dire*. Those jurors, the unspoken heroes of the criminal justice system, must have their privacy respected if this system is to continue to function. Less and less citizens are willing to serve on jury duty; 650 jurors were summoned in this case to produce 149 who appeared. Thus, the Court concludes that that jurors' right to privacy outweighs the public's right to know both their name, address and personal information on the juror questionnaire (Appendix E) *as well as* their specific answers to specific highly personal questions. The Court further concludes that the limitation of access to jurors' names and qualification forms is far less restrictive than the exclusion of the public from the proceedings during those areas of *voir dire* that are personal in nature, the method currently used by the Court in all non-capital criminal cases.

Therefore, the Court DENIES the intervenor's motion to vacate based on its determination that the administrative order is not a prior restraint since the jurors' names are not a public record and that based on the specific findings of this Court: the compelling interest of the defendant in having an impartial jury; as well as the privacy rights of the jurors; the State's right to a final resolution of this matter in this proceeding; and, the rights of over 100 witnesses to have this matter concluded at this time and without further proceedings require the order remain in effect.

IT IS SO ORDERED.

STEVEN B. PENNELL REPORTINGS PER THE NEWS JOURNAL PAPERS
(November 30, 1988 to March 4, 1989)

(APPENDIX A)

Steven B. Pennell Reportings
(November 30, 1988 to March 3, 1989)

Nov. 30, 1988

1. "Suspect held in serial killing case."
2. "Suspect a 'Teddy Bear' who likes children, pal says."
3. "Glasgow man, 33, arrested at home." also photo of Pennell at Magistrate Court 11.

Dec. 1, 1988

4. "Just a ordinary guy who wanted to be cop." also photo of Pennell
5. "Corridor resents 'bum rap' given by media."
6. "Newspaper press for release of documents in serial killer case."
7. "Murder suspect's neighbor breathing a little easier."
8. "Glasgow man sole suspect."

Dec. 2, 1988

9. "Papers filed on motion in serial killing case."

Dec. 3, 1988

10. "Serial kill suspect's mother in hospital."

Dec. 4, 1988

11. "Accused serial killer awaiting his pretrial hearing."

Dec. 5, 1988

12. "He came at me with duct tape . . . by the canal." (B. Leary column)

Dec. 6, 1988

13. "Task force checking tips on 5th victim." also photo of Pennell and various suspected victims.
14. "Sandy tells more: A grizzly tale of mutilation and murder."
15. "Pennell charged in 2 more killings."

Dec. 7, 1988

16. "Pennell's former neighbor recalls a 'kind of quiet' family man."
17. "Pennell arraigned 'by mistake'." (Pennell in photo with handcuffs).

Dec. 8, 1988

18. "A message from Pennell's stepdaughter: 'He's not a murderer'."
19. "Ruling opens most of file on Pennell."
20. "Details disclosed on investigation that led to Pennell."

Dec. 9, 1988

21. "Brother sensed trouble for doomed sister."

Dec. 10, 1988

22. "Pennell's attorney quits, cites money."
23. "Fibers from van may have been illegally obtained, says attorney."

Dec. 11, 1988

24. "Police feared serial case after two killings."

Dec. 16, 1988

25. "Gag order imposed on Pennell session."
26. "TV network program to produce Pennell story."

Dec. 17, 1988

27. "State to pay for Pennell's defense case."

Dec. 21, 1988

28. "Serial killer task force disbands, one task undone."

Dec. 31, 1988

29. "Pennell's lawyer, pro and con." (Editorial)

Jan. 4, 1989

30. "Attorney sought to help defend Pennell."

Jan. 20, 1989

31. "Slain prostitute's ship finally came in, but it was too late." (Editorial)

Feb. 10, 1989

32. "Two cases not copycat killings, police say."

Feb. 24, 1989

33. "Hairs link Pennell to second slain woman." also photo of Pennell

Mar. 3, 1989

34. "Officer in serial case got evidence against orders, boss says."

Mar. 4, 1989

35. "Police decoy's first hunch: 'This guy's weird'."

SUPERIOR COURT OF DELAWARE

MEMORANDUM

From: JUDGE GEBELEIN

TO: THE HONORABLE DEBORAH H. CAPANO
PROTHONOTARY

FELICIA C. JONES
ACTING JURY MANAGER

DATE: JULY 28, 1989

RE: STATE V. STEVEN B. PENNELL
JURY SELECTION

In order to protect the integrity of the jury in this case, I am taking the following steps:

1. I direct the Prothonotary to keep confidential the names of all jurors subpoenaed for this jury panel. The jury information sheet will be available only to the attorneys for the parties. The names will not be released to anyone else.

2. On jury selection days those jurors who respond will be assigned a number from 1 to 100. Those numbers will be placed on the juror information sheets delivered to the attorneys and the Court.

3. All jury selection in open Court will be accomplished by numbers and not by names.

IS IS SO ORDERED.

The Honorable Richard S. Gebelein

(APPENDIX B)

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The 12 who will

THE NEWS JOURNAL ** SATURDAY, JUNE 3, 1989

From the Dover Bureau

DOVER — Sitting within seven feet of Joyce Lynch for the past two weeks are two prison guards, a mortgage loan adjuster, at least one civilian employee of Dover Air Base and a gas company employee.

The five women and seven men selected to judge the murder defendant are mostly middle-age, employed and live in the state capital. Ten are white, two are black.

Their average age is 46.75 years, about 10 years older than the defendant. Five depend on glasses regularly, while at least two others carry them for close work. Five of the men are in various stages of balding.

Lynch and her husband, Richard, are accused of gunning down Joseph and Beverly Gibson on Christmas Eve 1987, and stealing their 9-day-old son, Matthew. Richard Lynch is scheduled for trial in September.

Both could face the death penalty if found guilty of any of four first-degree murder charges. They are also charged with conspiracy, burglary, possession of a deadly weapon during the commission of a felony and unlawful imprisonment.

The jurors value their privacy highly and became extremely upset when a Philadelphia television crew followed some of them to lunch and attempted to film them eating.

They avoid media, family members of the victims and defendant, and anyone else who appears recognizable, leaving local restaurants at the sight of a familiar face from the courtroom.

They are also fiercely attentive, following testimony intently. None has dozed off.

Their demeanor resembles that of tennis match spectators as they look at attorneys when questions are posed and witnesses who provide the answers, no matter how long or complicated.

And they watch Lynch, shifting their eyes away quickly if she returns a stare.

There are four alternates, two men and two women, who could participate in the deliberations should one of the original panel members be removed from service during the trial. Factor in their ages and the median age rises to 53.92 years.

Following are brief biographical sketches of the twelve people who will decide the guilt or innocent of the former Houston defendant:

■ Hazel Riley, 42, Dover. Married. Wears glasses; is stout; parts her short brown hair down the middle. Before being selected, she told Judge Henry du Pont Ridgely she remembered reading about the case "when it first happened," but assured him she was and can remain impartial. She is the forewoman.

■ James A. LeGates, 26, Dover. Average build; divorced; father of three children ages 8, 2 and 1. He has a mustache, wears jeans and is the youngest juror. He told the judge he still could be impartial despite the fact that he has a son the same age as Matthew.

■ Marion M. Haller, 54. Milford. Married; has two grandchildren, ages 2 and 4, who live with a daughter in New Jersey. Short brown hair, stern expression.

■ George M. Dixon, 48. Married; address unknown. A white-haired short man who wears tinted,

APPENDIX C

deliver Lynch verdict

wire-rimmed glasses. A guard at Delaware Correctional Center near Smyrna. Said he knew of one of the witnesses who works in the K-9 unit, but did not know her. Said he would not judge her credibility different from others.

■ Donald Francis Neizer, 56, Smyrna. Married; retired military officer. Used glasses to review his juror profile form, but does not wear them normally in court. He is of average height, has short black hair that is beginnng to gray, and has deep voice and stern demeanor.

■ Mary Lou Hurd, 50, Dover. Married. Short, stylishly dressed woman, with short, brown hair with specks of gray. One of few jurors during the selection process who spoke clearly and directly to Ridgely when queried about her ability to serve. Has a 23-year-old son.

■ Vetra A. Gunter, 27, address unknown. Married to a prison guard of whom she told Ridgely "doesn't discuss work with me." When on jury duty three years ago she complained that it was a waste of taxpayer money to keep so many people sitting around doing nothing all day. Is a mortgage loan adjuster for a bank.

■ Theresa M. Whalen, 68, Dover. Married and retired. Grandmotherly. Has curly, white hair. She likes a single strand of pearls with her outfits and admits to a hearing problem. As soon as she reaches her seat each day, she immediately untangles a hearing device about the size of a transistor radio and places the orange earplugs over her ears. "I don't use it all the time. At this time this is just like a back up," she told Ridgely, adding that she always has plenty of extra batteries on her. She uses the device daily during the testimony.

■ Norman Yankwitt, 54, Camden. Correctional officer at the prison near Smyrna. Like Dixon, juror number 4, he has not had any contact with the Lynches, who are being held separately at the Women's Correctional Institution, Claymont, and Gander Hill Prison, Wilmington. Rotund, mostly bald, with connecting side burns that lead to a close-cropped beard and mustache. Two children ages, 26, and 24; no grandchildren.

■ Lawrence A. Moroney, 43, Hazlettville. Short and round with thinning black hair. Remembers that "one was shot in the doorway and one in the car. And that the baby was missing." Said despite what he knew he had formed no opinions. "No, I'm just going to sit it out and see what happens." Has two children, ages 11 and 12.

■ Robert Lee Bloodsworth, 32, Harrington. Tall, balding and thin. Has a 3-year-old son and 2-month-old daughter. He said that wouldn't affect his impartiality given the closeness of the ages of his children to those of the Gibsons.

■ Oscar L. Collins, 61, Cheswold. Heavyset, balding gentleman who relies on black-rimmed eyeglasses and often sits forward in his jury seat. Has four grown children and four grandchildren, whose ages he guessed were 17, 18, 8 and 7 when Ridgely asked him during the jury selection process. Works for a gas company. The last time he read about this case was "when it happened around Christmas eve, I don't know what year."

Section 16. *Disclosure of Information About Jurors.* The names of qualified jurors drawn from the qualified jury wheel shall be made available to the public upon request unless the court determines in any instance that this information in the interest of justice should be kept confidential or its use limited in whole or in part.

The contents of jury qualification forms completed by qualified jurors drawn from the qualified jury wheel and summoned to serve, with the exception of their addresses, social security numbers, and telephone numbers, shall be made available to attorneys or unrepresented parties in cases to be tried before those jurors upon request before voir dire examination begins unless the court determines in any instance that this information in the interest of justice should be kept confidential or its use limited in whole or in part.

The addresses, social security numbers, and telephone numbers of jurors shall be disclosed only upon specific order of the court and subject to any limitations set by the court.

The contents of records or papers used by the jury commissioners in connection with the jury selection process shall be disclosed only in accordance with this plan or 10 *Del. C.* §4508(f). (As amended June 1, 1984)

Section 17. *Excusing Jurors.* Any judge of the Superior Court or the court administrator, subject to review by a judge, may, upon a showing of undue hardship or extreme inconvenience, excuse a juror for such period as is deemed necessary.

Section 18. *Recordkeeping and Reporting.* The Prothonotary in each of the counties shall maintain such records, including but not limited to the alphabetic list of names drawn from the master jury wheel, completed juror

(APPENDIX D)

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SUPERIOR COURT – STATE OF DELAWARE – JUROR QUALIFICATION FORM

Please place an X in the appropriate box and print or type your answers. See instructions on reverse side.

Street Address	Telephone: Home
	Work
City, State, Zip Code	Social Security
Mileage from your home to the Courthouse - one way:	

Last Name	First Name	Middle Name	Age_____ Birthdate	County you live
				How long?

Education:	Race:	Marital Status:
☐ Elementary ☐ High School	☐ Black ☐ White ☐ Hispanic	☐ Married ☐ Single
☐ College ☐ Graduate School	☐ Oriental ☐ Other_____	☐ Widowed ☐ Divorced

Occupation: ☐ Employed ☐ Unemployed ☐ Retired	Sex: ☐ Male ☐ Female
Employer's Name and Address:	

If retired or unemployed, last employer's name and address:	Spouse's Occupation:
	Employer's Name and Address:

	Yes	No
1. Are you a citizen of the United States of America?	☐	☐
2. Are you able to read, write, speak, and understand the English language?	☐	☐
3. Do you have any physcial or mental infirmity impairing your capacity to serve as a juror? If yes, describe._____	☐	☐
4. Have you ever entered a guilty plea or been found guilty and sentenced on any criminal charge for which a person could receive a sentence of more than one year imprisonment, even though your sentence might have been less, or do you have any such charge pending against you in any court? If yes, specify:_____	☐	☐
5. Are you a member in active service in the armed forces of the United States or the Delaware State Guard? If yes, specify._____	☐	☐
6. Are you a member of the fire or police departments of the State or a subdivision thereof? If yes, specify?_____	☐	☐
7. Are you actively engaged in the performance of official duties as a public officer who is either elected to public office or directly appointed by a person elected to public office in the executive, legislative, or judicial branches of the governments of the United States or of the State or a subdivision thereof? If yes, specify:_____	☐	☐
8. Have you ever been or do you have a close friend or relative who is or was employed in a police dept., the office of the Attorney General, or any other law enforcement agency? If yes, specify:_____	☐	☐
9. Have you ever been or do you have a close friend or relative who is or was employed by an insurance or claims adjustment company? If yes, specify:_____	☐	☐
10. Are you a stockholder in an insurance company which issues accident or casualty insurance?	☐	☐
11. Do you request excuse from jury service on the basis of any of the grounds listed on the reverse side? If yes, explain:_____	☐	☐

I swear or affirm that my responses in this form are true to the best of my knowledge.

_____ _____

DATE (SIGNATURE)

SPACE FOR OFFICIAL USE ONLY Date:

Served_____ Qualified_____ Disqualified_____ Exempt_____

Excused_____ Excused_____ Reason_____

INSTRUCTIONS FOR COMPLETING QUALIFICATION FORM

THIS IS NOT A NOTICE TO REPORT FOR JURY SERVICE AT THIS TIME. THE PURPOSE OF THIS FORM IS TO DETERMINE IF YOU ARE ELIGIBLE TO BE CALLED FOR JURY SERVICE AT SOME FUTURE TIME. WHEN YOU ARE SELECTED TO SERVE, YOU WILL RECEIVE NOTICE TO REPORT ON A SPECIFIC DATE.

YOU ARE REQUIRED BY TITLE 10, SECTION 4502(6) OF THE DELAWARE CODE TO COMPLETE THIS FORM AND RETURN IT WITHIN *TEN DAYS.* A POSTAGE-PAID ENVELOPE IS ENCLOSED. IF YOU ARE UNABLE TO FILL OUT THIS FORM, HAVE SOMEONE DO IT FOR YOU AND EXPLAIN THE REASON. ANY PERSON WHO FAILS TO RETURN A COMPLETED FORM WILL BE SUMMONED TO APPEAR AT THE COURTHOUSE TO COMPLETE IT IN THE PRESENCE OF THE JURY COMMISSIONERS. ANY PERSON WHO WILLFULLY MISREPRESENTS A MATERIAL FACT ON A JURY QUALIFICATION FORM FOR THE PURPOSE OF AVOIDING JURY SERVICE, MAY BE FINED NOT MORE THAN $100.00 OR IMPRISONED NOT MORE THAN THREE DAYS, OR BOTH.

PLEASE ANSWER ALL QUESTIONS AND SIGN THE FORM. IF THE PERSON TO WHOM THIS FORM HAS BEEN SENT IS NO LONGER AT THAT ADDRESS, PLEASE ATTACH A NOTE OF EXPLANATION AND RETURN THE FORM IN THE ENVELOPE PROVIDED. *IT IS VERY IMPORTANT THAT ALL FORMS ARE RETURNED.*

INFORMATION REGARDING RACE IS *REQUIRED* SOLELY TO ENFORCE NON-DISCRIMINATION IN JURY SELECTION AND HAS NO BEARING ON YOUR QUALIFICATION FOR JURY SERVICE.

PLEASE MAKE ALL COMMENTS REGARDING ANY PROBLEMS YOU MAY HAVE BY BEING SUMMONED FOR JURY DUTY IN THE SPACE PROVIDED UNDER QUESTION #11 ON THE FORM. IF NECESSARY, YOU

MAY ATTACH ANOTHER SHEET OF PAPER TO THIS FORM. IF YOU HAVE A PHYSICAL OR MENTAL ILLNESS THAT WOULD MAKE IT IMPOSSIBLE FOR YOU TO REPORT FOR JURY DUTY AT ALL, PLEASE ATTACH A STATEMENT FROM YOUR DOCTOR EXPLAINING THE NATURE OF YOUR ILLNESS.

PERSONS IN ANY OF THE FOLLOWING CATEGORIES WHO WANT TO BE EXCUSED FROM JURY SERVICE MAY ATTACH A WRITTEN REQUEST FOR EXCUSE STATING THE REASONS IN DETAIL. THE JURY COMMISSIONERS WILL SCREEN EACH REQUEST TO DETERMINE IF AN EXCUSE IS WARRANTED.

1. Persons over 70 years of age;
2. Persons actively engaged as members of the clergy;
3. Persons who must decline to serve as jurors because of deeply-held religious beliefs;
4. Persons having custody and care of a child or children under 15 years of age;
5. Persons having the personal responsibility and physical care of family members who are unable to care and look after themselves because of a mental or physical disability or infirmity of age;
6. Persons practicing as attorneys, physicians, dentists, nurses, medical or dental technicians;
7. Persons actively teaching or otherwise essentially employed in the operation of any public, parochial or private school;
8. Sole proprietors or sole supervising managers of small businesses;
9. Students attending any high school, vocational or training school, college or graduate school whether public, private or parochial;
10. Persons without private or reasonable public means of transportation;
11. Persons who have served on a grand or petit jury within the past two years.

EXHIBIT G

IN THE
SUPREME COURT OF THE STATE OF DELAWARE

GANNETT CO., INC.,	:	
	:	No. 372, 1989
Intervenor Below,	:	
Appellant,	:	
	:	
v.	:	
	:	
STATE OF DELAWARE,	:	
	:	
Plaintiff Below,	:	
Appellee,	:	
	:	
v.	:	
	:	
STEVEN B. PENNELL,	:	
Defendant Below,	:	
Appellee.	:	
Submitted	:	October 2, 1989
Decided	:	October 3, 1989

Before CHRISTIE, Chief Justice, HORSEY and HOLLAND, Justices.

ORDER

This 3rd day of October, 1989, it appears to the Court that:

1) The Reporter's Committee for Freedom of the Press, The American Society of Newspaper Editors, The Maryland-Delaware-District of Columbia Press Association, The National

Newspaper Association, and The Society of Professional Journalists ("the Movants"), have filed a motion pursuant to Supreme Court Rule 28 for leave to file an *amicus curiae* brief in the above-captioned case, in support of the position of the appellant, Gannett Co., Inc.

2) The Movants represent to this Court that:

(a) The Reporter's Committee for Freedom of the Press is a voluntary, unincorporated association of news reporters and editors dedicated to protecting the First Amendment interest of the news media.

(b) The American Society of Newspaper Editors is a nationwide, professional organization of more than 1,000 people who hold positions as directing editors of daily newspapers throughout the United States.

(c) The Maryland-Delaware-District of Columbia Press Association is a nonprofit trade association composed of 119 daily and nondaily newspapers, including 20 newspapers published in the State of Delaware.

(d) The National Newspaper Association, with 5,000 members, is the oldest and largest national trade association in the newspaper industry, representing the interests of weekly and daily newspapers throughout the country.

(e) The Society of Professional Journalists, a voluntary, nonprofit organization of 24,000 members representing every branch and rank of print and broadcast journalism, is dedicated to ensuring that the public's business is conducted in public and keeping government proceedings, including judicial proceedings, open to public.

3) The Movants suggest that the decision in this case could have a significant impact on their First Amendment rights to gather and report news, as well as the First Amendment rights of other national and regional organizations of print and broadcast news reporters, editors, and publishers. The Movants suggest that "because of their broad constituencies, [they] are able to provide a national perspective on this issue which has only recently come to the fore in Delaware."

4) Translated literally from Latin, *amicus curiae* means friend of the court. However, *Black's Law Dictionary* also includes the following in its definition of *amicus curiae:*

> A person with strong interest in or views on the subject matter of an action may petition the court for permission to file a brief, ostensibly on behalf of a party but actually to suggest a rationale consistent with its own views. Such amicus curiae briefs are commonly filed in appeals concerning matters of a broad public interest. . . .

Black's Law Dictionary 75 (5th ed. 1979).

5) The committee commentary to Supreme Court Rule 28 states that it is in substantial compliance with Section 3.33(b)(2) of the American Bar Association ("ABA") *Standards Relating to Appellate Courts.* That section reads as follows:

> Public Question Cases. In cases involving questions of general public importance, the court may appropriately permit submission of briefs *amicus curiae* on behalf of those whose circumstances may be affected by the court's decision.

ABA, *Standards Relating to Appellate Courts* § 3.33(b)(2) (1977).

6) The Court finds that the interests of justice will be served by permitting the Movants to file a brief as *amicus curiae* in this matter, subject to all Rules of this Court, including the limitation of argument to the record and the brief schedule that have been established.

7) The Movants, collectively, shall, as *amicus curiae,* file one opening brief that shall not exceed a total of 20 pages, exclusive of its appendix, and one reply brief that shall not exceed a total of 10 pages, exclusive of its appendix.

NOW, THEREFORE, subject to all Rules of this Court, the brief schedule that has been established, and the page limitation set forth herein, IT IS HEREBY ORDERED that the motion of the Movants to file a brief as *amicus curiae* is GRANTED.

BY THE COURT:

_____

Justice

EXHIBIT H

IN THE
SUPREME COURT OF THE STATE OF DELAWARE

GANNETT CO., INC.,	:	
	:	No. 372, 1989
Intervenor Below,	:	
Appellant,	:	
	:	
v.	:	
	:	
STATE OF DELAWARE,	:	
	:	
Plaintiff Below,	:	
Appellee,	:	
	:	
v.	:	
	:	
STEVEN B. PENNELL,	:	
Defendant Below,	:	
Appellee.	:	

ORDER

This 20th day of October, 1989,

IT IS ORDERED, pursuant to Supreme Court Rule 4(d):

(1) That the above captioned appeal, after having been the subject of oral argument before a panel of three justices on October 20, 1989, is hereby scheduled for rehearing by this Court, sitting as the Court *en banc*.

(2) In connection with said rehearing, the parties are directed to exchange supplemental memoranda, not to exceed 20 pages in length, on or before October 30, 1989, addressing the question whether the Superior Court's opinion and order of October 2, 1989 raises issues of the public's right to access to judicial records, and if so what standards are to be applied to the

denial of such access. Without limiting the parties' responses, they are directed to consider *Nixon v. Warner Communications, Inc.*, 435 U.S. 1306 (1978); *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325 (D.C. Cir. 1985); *Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983); *Newsday, Inc. v. Sise*, 71 N.Y. 2d 146 (N.Y. 1987) cert. denied, 108 S.Ct. 2823 (1988); *Hearst Corp. v. State*, 484 A.2d 292 (Md. Ct. Special App. 1984).

(3) Argument on the appeal will be scheduled for rehearing before the Court *en banc* at the earliest available date after the supplemental memoranda are exchanged.

BY THE COURT:

_____

Chief Justice

EXHIBIT I

IN THE
SUPREME COURT
OF THE STATE OF DELAWARE

GANNETT CO., INC., Intervenor below, Appellant,	:	
v.	:	No. 372, 1989
STATE OF DELAWARE, Plaintiff Below, Appellee,	:	Court Below: Superior Court of the State of Delaware in and for New Castle County in Cr.A. Nos. N88-12-0051, N88-12-0052, N88-12-0053.
v.	:	
STEVEN B. PENNELL, Defendant Below, Appellee.	:	

Submitted: October 31, 1989
Decided: November 13, 1989

Before CHRISTIE, Chief Justice, MOORE, WALSH and HOLLAND, Justices, and HARTNETT, Vice Chancellor, constituting the Court *en banc*.

ORDER

This 13th day of November, 1989, upon consideration of the briefs and oral argument of the parties, it is ordered that the order of the Superior Court from which this appeal is taken be, and the same hereby is, AFFIRMED. The mandate shall issue immediately.

The Chief Justice and Justice Walsh dissent. Opinions of the majority and minority will issue in due course.

BY THE COURT:

_____
Justice, for the majority